(25,198)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 423.

GREAT NORTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

J. C. ALEXANDER, ADMINISTRATOR OF THE ESTATE OF JOHN P. HALL, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

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a In the Supreme Court of the State of Montana.

No. 3574.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Transcript on Appeal.

Messrs. Walsh, Nolan & Scallon and Messrs. Logan & Child, Counsel for Respondent.
Messrs. Noffsinger & Walchli, Messrs. Veazey & Veazey, Counsel for Appellant.

Appeal from the Eleventh Judicial District of the State of Montana, in and for the County of Flathead.

Filed February 3, 1915. John T. Athey, Clerk.

1 In the Supreme Court of the State of Montana.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Transcript on Appeal.

Messrs. Walsh, Nolan & Scallon and Messrs. Logan & Child, Counsel for Respondent.
Messrs. Noffsinger & Walchli, Messrs. Veazey & Veazey, Counsel for Appellant.

Appeal from the Eleventh Judicial District of the State of Montana, in and for the County of Flathead.

2 In the District Court of the Eleventh Judicial District of the State of Montana in and for the County of Flathead.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Plaintiff,
vs.
GREAT NORTHERN RAILWAY COMPANY, a Corporation, Defendant.

Complaint.

The plaintiff above named complains of the defendant, and for cause of action, alleges:

I.

That the defendant, Great Northern Railway Company, is now, and at all of the times hereinafter mentioned was, a corporation, duly created, organized and existing under and by virtue of the
3 laws of the State of Minnesota, and as such corporation was the owner of and in control of and engaged in the business of operating a railroad which extended into and through the States of Minnesota, North Dakota, Montana, and points beyond the last named state, and during all of said times was engaged in interstate commerce between the several states.

II.

That, on the 11th day of October, 1911, and for a long time prior thereto, one John P. Hall was employed by the defendant company as a conductor on one of its trains, and on said 11th day of October, 1911, at the time he sustained the injuries hereinafter set forth, the said John P. Hall, as such conductor, so in the employ of the defendant, and the defendant were engaged in interstate commerce.

III.

That, on the 11th day of October, 1911, and for a long time prior thereto, the defendant negligently and carelessly allowed and permitted its right of way track and property to be and remain unfenced on both sides thereof, at and near the place where the said John P. Hall was killed, as hereinafter set forth, so that cattle could enter upon said right of way tracks and property, and being so on said right of way tracks and property were likely to
4 cause derailment of trains through collision, and the said defendant, at all of said times negligently permitted trains to run over its said track while said right of way tracks and property were so unfenced, as aforesaid.

IV.

That, on said last mentioned date, to-wit, the 11th day of October, 1911, the said John P. Hall, in the regular course of his employment by the defendant as conductor, as aforesaid, was assigned to duty on one of its trains so engaged in interstate commerce, as aforesaid, running between Marion and Kalispell over said track, negligently left unprotected and unfenced, as aforesaid;

That while said train was being backed with the caboose in front thereof from Kila to Kalispell, between the hours of seven and nine-thirty o'clock P. M. said train collided with a cow; said cow having gone upon said track because of the carelessness and negligent failure of the defendant to have said track fenced, as aforesaid;

That, as a result of said collision, the said caboose in which the said John P. Hall, in the regular course of his employment was riding, was derailed, throwing the said Hall onto the said track,

that being so thrown, the said train passed over his body
5 inflicting injuries upon him, from which he thereafter on, to-wit, the 11th day of October, 1911, died.

V.

That, at the time of his death, the said John P. Hall was in robust health, of the age of forty-two years, and was earning, and capable of earning one hundred and eighty dollars a month.

VI.

That the said John P. Hall left surviving him his wife, Cassandra E. Hall, and five children, Ailden, Eugene Clarence, Pauline, Grace and Dorothy, aged respectively eighteen, sixteen, fourteen, twelve and four years, who constitute his sole surviving heirs at law, for whose benefit this action is instituted and prosecuted.

VII.

That by reason of the facts and premises aforesaid and the death of the said John P. Hall, plaintiff has suffered damage in the sum of fifty thousand dollars ($50,000.00).

VIII.

Plaintiff further avers that in the above entitled court on the 5th day of August, 1913, application for letters of administration on the estate of the said John P. Hall, deceased, was duly made by the plaintiff herein, and thereafter, on the 18th day of
6 August, 1913, letters of administration were duly issued to plaintiff, who thereupon duly qualified as such administrator, and ever since said date has been, and now is the duly appointed, qualified and acting administrator of said estate.

Wherefore, plaintiff demands judgment against the defendant for the sum of fifty thousand dollars ($50,000.00), and for costs of suit.

LOGAN & CHILD,
WALSH, NOLAN AND SCALLON,
Attorneys for Plaintiff.

Duly verified.

Indorsed: Filed Aug. 19, 1913.

(Title of Court and Cause.)

Demurrer.

Comes now the above-named defendant, Great Northern Railway Company, and demurs to the plaintiff's complaint on file herein for the following reason appearing upon the face thereof, to-wit:

That said complaint does not state facts sufficient to constitute a cause of action.

VEAZEY & VEAZEY AND
NOFFSINGER & WALCHLI,
Attorneys for Defendant.

7 Indorsed: Filed Sept. 8, 1913. Minute Entry of Order Overruling Demurrer to Complaint. 51st day June Term 1913. No. 3277. September 16th, 1913.

(Title of Court and Cause.)

Defendant's Demurrer to Plaintiff's Complaint is submitted to the Court and by the Court overruled, and the defendant is given 30 days in which to Answer.

J. E. ERICKSON, *Judge.*

(Title of Court and Cause.)

Answer.

Comes now the defendant, Great Northern Railway Company, in the above entitled action, and for its answer to the complaint of the plaintiff on file herein, admits, alleges and denies, as follows:

I.

1. Save as hereinafter specifically admitted or denied, this defendant denies each and every allegation, matter and thing in plaintiff's complaint contained.

8 2. The defendant admits the allegations of paragraph numbered I. of said complaint.

3. Defendant denies each and every allegation, matter and thing in paragraphs numbered II, III, IV, V, VI, VII and VIII in said complaint contained; except, however, this defendant admits that on or about the 11th day of October, 1911, John P. Hall, named in the said complaint, was employed by the defendant, Great Northern Railway Company, as a conductor on one of its trains, and that on said day, in the course of his employment by this defendant as a conductor, was on duty as such conductor on one of this defendant's trains running between Marion and Kalispell, and over a track owned and operated by this defendant, and that while said train was being backed, with the caboose in front thereof, from Kila to Kalispell at about eight o'clock P. M. on said day, said train collided with a cow which had gone upon said track, and that, as a result of said collision, the said caboose in which said John P. Hall was riding, was derailed, and that thereafter the said train passed over the body of said Hall, inflicting injuries from which he immediately died on said 11th day of October, 1911; and except, also, this defendant admits that said deceased, at the time of his death, was of an

age exceeding fifty years, and was earning, and capable of
9 earning not to exceed One Hundred and Forty Dollars ($140.) per month.

II.

For its second separate defense to said complaint, this answering defendant says: That if it was in any respect negligent in any of the matters complained of in the complaint, then, and in that event, the death of John P. Hall, deceased, referred to in the said complaint, was due to and caused by his own fault and carelessness, and to the failure of said deceased at all times and places stated in the said complaint to exercise such reasonable care and caution for his own safety as the average reasonably prudent person, under all the circumstances then and there existing, would, could and should, and ordinarily would have exercised, as hereinafter set out, and otherwise, and his own fault and carelessness, and his failure at all times and places set forth in the complaint to exercise such reasonable care and caution for his own safety, as the average reasonably prudent person, under all the circumstances then and there existing, would, could and should, and ordinarily would have exercised, as hereinafter set out and otherwise, was a proximate and the greater cause of, and contributed to cause his injuries and death, and his negligence and carelessness and failure aforesaid, either wholly or alone, caused his injuries and death, or contributed almost
10 wholly and greatly and proximately to cause said injuries and death.

Defendant further says that said deceased so negligently operated and backed said train, with the caboose at the front end thereof, as the same was proceeding toward Kalispell, that the same was derailed by said collision with said animal referred to in the said complaint, and said deceased so negligently operated said train and backed said train, with the caboose in the position aforesaid, and standing upon the rear platform of the caboose, that the same was derailed, and thereby, and by reason of the facts aforesaid, the said deceased was killed.

III.

For its third separate defense to said complaint this answering defendant says:

That the injuries to and death of John P. Hall, deceased, named in the said complaint, were due to and caused by causes, the risk of injury from which the said deceased, at all times and places stated in said complaint, assumed; that cattle and other animals at all times stated in the complaint, and long prior thereto, were frequently found upon said track between Kalispell and Marion, and at the place where said cow was upon said track.

Defendant further says that at all times and places stated in the complaint, and long prior thereto, in the exercise of such
11 reasonable care and caution as the average reasonably prudent person could, would and should have exercised, and

would ordinarily have exercised, under the circumstances then and there existing, the said deceased would have known, and in fact, actually well knew, all of the facts regarding the condition of the track referred to in the said complaint, and the condition of all fences along, near or adjoining said track, and the dangers, if any, arising therefrom, and the dangers, if any, arising from the operation of said train in the manner alleged in the said complaint, and appreciated said dangers, if any, and that cattle and other animals at all times and places stated in the complaint, and long prior thereto, were frequently found upon said track; that deceased, in the exercise of reasonable care aforesaid, could, should and would have known, and ordinarily would have known, and in fact, actually well knew and appreciated all the dangers, if any, arising from the method by which, and under which he was operating said train.

Wherefore, having fully answered, defendant prays that it may be dismissed hence with its costs of suit.

NOFFSINGER & WALCHLI AND
VEAZEY & VEAZEY,
Attorneys for Defendant Great Northern Railway Company.

12 Duly verified.

Indorsed: Filed Oct. 17, 1913.

(Title of Court and Cause.)

Reply.

Now comes the plaintiff, and for reply to defendant's answer:

I.

Denies the allegations of the second, separate defense, so-called, the same being sub-division two of said answer.

II.

Denies the allegations of the third separate defense, so-called, the same being sub-division three of said answer.

LOGAN & CHILD,
WALSH, NOLAN & SCALLON,
Attorneys for Plaintiff.

Duly verified.

Indorsed: Filed Oct. 25, 1913.

(Title of Court and Cause.)

Verdict.

We, the Jury in the above entitled cause, find for the plaintiff, and assess his damages at Fifteen Thousand Dollars; and, of the sum thus found, we apportion to the heirs the following sums:

13 To the widow, Cassandra E. Hall, Six Thousand Dollars, (6,000.00).
To the daughter, Aildeen, One Thousand Dollars, (1,000.00).
To the son, Eugene Clarence, One Thousand Dollars, (1,000.00).
To the daughter, Pauline, Fifteen Hundred Dollars, (1500.00).
To the daughter, Grace, Twenty Five Hundred Dollars, (2500.00).
To the daughter, Dorothy, Three Thousand Dollars, (3,000.00).

JOSEPH SINDELAR, *Foreman.*

Indorsed: Filed Dec. 6, 1913.

(Title of Court and Cause.)

Judgment on Verdict.

This action came on regularly for trial upon December 4th, 1913, the said parties appeared by their Attorneys Messrs. Walsh, Nolan & Scallon and Logan & Child Counsel for Plaintiff, and Messrs. I. Parker Veazey, Jr. and Noffsinger & Walchli for Defendant. A jury of twelve persons was regularly empaneled and sworn to try said cause. Witnesses on the part of Plaintiff and Defendant were sworn and examined. After hearing the evidence, the ar-
14 guments of Counsel and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court the following verdict:

(Title of Cause and Court Omitted.)

"We, the jury in the above entitled cause find for the plaintiff and assess the damages at Fifteen thousand dollars and of the sum thus found we apportion to the heirs the following sums: To the widow, Cassandra E. Hall, Six Thousand Dollars (6,000.00; to the daughter Aildeen, One thousand dollars (1,000.00; to the son Eugene Clarence, One thousand dollars (1,000.00; to the daughter Pauline Fifteen hundred dollars (1500.00; to the daughter Grace Two thousand five hundred dollars (2500.00; to the daughter Dorothy Three thousand dollars (3000.00.

JOSEPH SINDELAR, *Foreman.*"

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged and decreed that the plaintiff, J. C. Alexander, Administrator of the Estate of John P. Hall, deceased, have and recover of and from the defendant, Great Northern Railway Company, the sum of Fifteen thousand dollars together with costs of suit taxed at $174.35 *dollars.*

Judgment entered this 8th day of December A. D. 1913.
15 [COURT SEAL.] SAM D. McNEELY,
Clerk of Court,
By R. N. EATON, *Deputy.*

Indorsed: Filed Dec. 8, 1913.

(Title of Court and Cause.)

Certificate of Judgment Roll.

I, the undersigned, Clerk of the District Court of the Eleventh Judicial District of said State of Montana, in and for the County of Flathead, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book three of said Court at page 123. And I further certify that the foregoing papers hereto annexed constitute the Judgment Roll in said action.

Witness my hand and the seal of the said District Court, this eighth day of December, 1913.

[SEAL.] SAM D. McNEELY, *Clerk*,
By R. N. EATON, *Deputy Clerk*.

Endorsed: Filed Dec. 8th, 1913.

(Title of Court and Cause.)

16 *Notice of Intention to Move for a New Trial.*

To the Plaintiff in the above entitled cause and to Messrs. Walsh, Nolan & Scallon and Messrs. Logan and Child, his attorneys:

You and each of you will please take notice: That (having first received notice of the entry of judgment herein by a written notice served upon this defendant on the 9th day of December, 1913, by service thereof upon Hans Walchli one of the Attorneys for said defendant, Great Northern Railway Company, wherein and whereby said defendant, Great Northern Railway Company, was advised, and was first advised and given notice that judgment had been entered in the above entitled action on the 8th day of December, 1913) the defendant, Great Northern Railway Company, as the party aggrieved, intends to move the Court to vacate and set aside the verdict of the jury herein, and to grant a new trial of the above entitled cause upon the following grounds, which grounds are grounds materially affecting the substantial rights of the said defendant, to-wit:

1. Irregularity in the proceedings of the Court, jury and adverse party, by which the said defendant was prevented from having a fair trial of said cause.

17 2. Misconduct of the jury.

3. Excessive damages appearing to have been given under the influence of passion or prejudice.

4. Insufficiency of the evidence to justify the verdict .

5. Insufficiency of the evidence to justify the decisions of the Court adverse to said defendant Railway Company in the course of the trial.

6. That the verdict is against law.

7. Errors in law occurring at the trial, and excepted to by said defendant Railway Company.

Said motion for a new trial will be made, as to grounds 1 and 2 above mentioned, upon affidavits to be hereafter served and filed, and upon a bill of exceptions hereafter to be served and filed, and as to grounds 3, 4, 5, 6 and 7, said motion will be made upon a bill of exceptions hereafter to be served, settled and filed, and upon the minutes of the Court.

NOFFSINGER & WALCHLI AND
VEAZEY & VEAZEY,
Attorneys for Defendant Great Northern Railway Company.

18 STATE OF MONTANA,
County of Flathead, ss:

W. N. Noffsinger, being first duly sworn, deposes and says: That he is one of the Attorneys of record for the defendant, Great Northern Railway Company, and one of the co-partners of the partnership of Noffsinger & Walchli, Attorneys of record for said defendant Railway Company in the above entitled cause, and as such, makes this affidavit for and on its behalf. Affiant further says that said defendant, Great Northern Railway Company, first received notice of the entry of judgment herein on the 9th day of December, 1913, and on said day, for the first time written notice, and the only notice, was served upon affiant or said defendant, giving notice of the entry of said judgment, a true copy of which said notice is hereto attached, marked "Exhibit A," and on the 8th day of December, 1913, judgment was first entered.

W. N. NOFFSINGER.

Subscribed and sworn to before me this 13th day of December, A. D. 1913.

[SEAL.] HANS WALCHLI,
Notary Public for the State of Montana, Residing at Kalispell, Flathead County, Montana.

My commission expires May 19, 1914.

19 EXHIBIT "A."

(Title of Court and Cause.)

Notice of Judgment.

To Messrs. I. Parker Veazey, Jr., and Noffsinger & Walchli, Attorneys for the Above-named Defendant:

Please take notice that on the 8th day of December, 1913, a judgment in favor of the above named plaintiff was made and entered in the above entitled cause against the above named defendant in the sum of Fifteen thousand dollars ($15,000.00) together with costs taxed at one hundred seventy-four 35/100 Dollars, a copy of which

judgment is hereto attached and made a part of this notice, which said judgment is entered and recorded in Book 3 of Judgments on page 123 of Judgment records in the office of the Clerk of said Court.

Dated this 8th day of December, 1913.

WALSH, NOLAN & SCALLON, AND
LOGAN & CHILD,
Attorneys for Plaintiff.

Due service of within notice and exhibit this 13th day of December, 1913 is hereby admitted.

WALSH, NOLAN & SCALLON,
LOGAN & CHILD,
Attorneys for Plaintiff.

(For copy of Judgment attached see Page 13-14 this transcript.)

R. N. E.

20 Notice of Intention and accompanying papers Indorsed filed Dec. 13th, 1913.

(Title of Court and Cause.)

Bill of Exceptions.

Be it Remembered, that this cause came on regularly for trial the fourth of December, A. D. 1913, before the Honorable John A. Matthews, Judge of the District Court of the fourteenth Judicial District of the State of Montana, duly and regularly called and appointed to try said cause presiding in the place and stead of the Honorable John E. Erickson, the Judge of said Court. Upon said cause being called for trial, Messrs. Logan & Child and Messrs. Walsh, Nolan & Scallon appeared as counsel for the Plaintiff, and Messrs. Noffsinger & Walchli and Messrs. Veazey & Veazey appeared as counsel for the Defendant. Thereupon a jury of twelve persons was duly and regularly empaneled and sworn to try said cause; and thereupon the following proceedings were had and the following evidence introduced, and none other, to-wit:

J. C. ALEXANDER, the plaintiff in the above entitled cause, being first duly sworn in his own behalf, testified as follows:

Q. Mr. Alexander, what is your name?

Mr. Veazey: We desire at this time to object to the introduction of any evidence in this cause on the ground that the complaint
21 does not state facts sufficient to constitute a cause of action.

Which objection was by the Court overruled, to which ruling of the Court the Defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

A. J. C. Alexander.

I live in Kalispell; have lived here for about eleven years in the Valley, about five or six years here in the city. In the Valley, before coming to the City, I lived about a mile and a half or two miles from Kila, a little to the west or south of Kila. I lived in the vicinity of Kila from 1902 to 1906 or '7, and then came to Kalispell. The line that runs to Marion was in operation when I moved into the Valley; at one time it was a main line and extended further west to Jennings, I believe. I think about four or five years after I moved into the Valley it was discontinued as a main line; I guess that would be in 1905 or '6; since then it has been operated as a branch of the main line. This branch now leaves the main line at Columbia Falls and extends to Marion. In the vicinity of Kila I lived about a mile from the track and have kept in touch with the place there after I left there in 1905 or '6 down to the present time, and especially down to October, 1911, yes, sir. I know the country there, know the
22 highways and have traveled on those highways a number of times. I prepared at your request a diagram, marked "Plaintiff's Exhibit A," showing the relationship of the highways out there with the track. That diagram, "Exhibit A", also shows the different localities as marked upon the paper itself.

Thereupon Plaintiff's "Exhibit A" was offered and received in evidence without objection, and is by this reference made a part of this Bill of Exceptions.

(Witness, continuing:) This Plaintiff's Exhibit A is for the purpose of illustration and is not drawn to scale. The exhibit shows a highway about a quarter of a mile west of where the accident was supposed to have occurred, and the other highway about a mile or a mile and a quarter east of where the accident is supposed to have occurred. The highways which cross the track are marked as Highways, public roads. There is a public road paralleling the track upon the north side; public road paralleling the track extends from the public road a mile and a quarter eats of where the accident occurred to a mile and a quarter west of where the accident occurred and that is marked on the plat as "Public Road"; the railroad track is also so marked. The meandering line is intended to represent Ashley Creek flowing out of Ashley Lake near Sedan or Kila. This
23 creek crosses this railroad between the two public highways that intersect the railroad and it also crosses the public highway that runs parallel to the track and north of it. I have marked Batavia Siding about a mile east, and have marked Kalispell on the plat, and have also marked on the plat the line that runs from Kalispell to Somers.

I say that I have kept in touch with the neighborhood out there since I left there in 1906 down to 1911. The track conditions and the road conditions and the fence conditions have been practically the same and were practically the same in 1911 as they were in 1905 and 1904 when I was out there. The distance between those two highways that intersect the railroad track is about two miles. That neighborhood is thickly settled farming country. The country out there is practically level up the valley along the wagon road and the

right of way of the railroad. In 1911 there were cattle through that country, yes, sir. The farmers along the track there have bunches of cattle, yes sir. These cattle were permitted to be around the neighborhood of the track and the highways and also back in the hills; the cattle were back and forth I think.

Q. And what, if any, fencing was maintained there by the railroad for the purpose of keeping those cattle off the track?

24 Whereupon it was stipulated between the parties to this action by their respective counsel of record that there were no fences adjoining the railroad right-of-way from Kalispell to Marion, and especially including the place where the accident referred to in the complaint is alleged to have occurred, and that the Railroad Company did not construst or maintain any fence, and had not prior to October, 1911, or at any time, constructed or maintained any fences along its Kalispell-Marion branch referred to in the evidence and in the complaint in this case as part of the line on which the accident in question occurred and on which the accident in question occurred.

Q. What do you say as to whether or not within your knowledge, and during the time you were out there, cattle sometimes got on the track?

A. I have seen them on the track. And during the times that I have been out there since I left there and came to live in Kalispell, yes, sir, I have seen cattle on the track. The surrounding country on either side of the track is almost level with the track, yes, sir, and there are no natural barriers there that would prevent cattle from getting on the track.

Thereupon it was stipulated between the parties that the witness is the duly appointed, qualified and acting administrator in the estate of John P. Hall, deceased, referred to in the Complaint, and
25 was such at the time of the commencement of this action, and has been such ever since.

Witness, continuing: There is public domain in the neighborhood of the railroad there west and south of the railroad, or west and east, or north and south of the valley. Each settler who has title to land there has his own separate allotment fenced. The road shown on the plat east of Batavia Siding runs up into the northern hills, which road is known as the Boorman Mill road, and after crossing the track it is the main road into Kalispell, down the valley into Kalispell. As regards the land in those hills some of that land has been taken up and settled upon, and I presume that there is some that is vacant. Yes, sir, cattle and horses congregate up there on those hills. Those hills would be about two miles from the railroad track. If those cattle and horses should have a wandering disposition and get to the track and go along this public highway north of the track, there would be nothing in the world to prevent them getting on the track if they felt disposed to do so.

Cross-examination:

I am a citizen of Montana. As regards this plat, the road which I refer to as the easterly road is the one nearest to Kalispell. Then there is a road to the west. I should think the distance be-
26 tween those roads would be about two miles. The easterly road is half a mile, or possibly more, from the east switch at the Batavia Siding. That line runs through a mountainous country, except that it runs through the valley, but after you get up ten or twelve miles into the valley, the valley narrows up and you get some pretty steep places. And there are places on that line where the road runs through deep cuts and even through cliffs in places. The road runs on the side of the hill in places, but at the exact place where this accident happened the track is down in the low land, with the land gradually sloping away from the track and getting higher as you get away from the track, and afterwards you get up on top of some pretty respectable hills. In this particular locality where the accident happened the land is classified as valley land; it is a mountain valley. The valley is about a mile wide in places as you get west where it narrows up, but as you come down the valley nearer Kalispell and leave Kalispell it is possibly in the widest place three miles wide. The roads that I have marked there as leading down to the railroad track are fenced by the adjoining land owners on each side, so that those roads are really lanes. Nevertheless cattle now and then do stray along the public roads and get into or on to the railroad track. During the grazing season it would be practically true,
27 yes, sir, that any day some animals will be found on that right of way from Kalispell to Marion, either on the track or adjoining the track. The winter season you don't see so much stock on the track. You see stock along the track in the summer season. Yes, sir, I would say that during the grass season you would be apt to see one head of cattle somewhere along that line almost every day, somewhere on the right of way or on the track. I don't mean right on the track. You are liable to see them any time. The grass season is from the Spring time until the Fall, until snow comes; that would be along about November. I feel that on that Kalispell line from Kalispell to Marion, or any where along there, you would be able to find at least one head of cattle straying along there on the right of way almost every day. I have travelled the road a great many times in that valley since moving into the valley, and I have travelled the road when I have noticed a number of head of cattle, say, seven, eight, ten or fifteen cattle, and I presume I have seen thirty head of loose stock, cattle, within this limit shown on this diagram—within the two miles along on the right of way between the two roads. I have seen the cattle along on the right of way and on the track. It is very rare when you find as many as thirty head at one time, but I think I am safe in saying that I have seen as high as thirty
28 head. As regards to whether I would be apt to find in that stretch of track between those two roads perhaps one head of stock a day straying along the right of way or on the track, I will say that I have travelled the road and haven't seen any cattle there.

No, I don't think that generally you would see one head of cattle there a day. There has been a number of times in traveling that road that I haven't noticed and can't call to memory but what the road has been clear, so far as cattle is concerned. There was considerable travel on those public roads that I have referred to in the day time; they were the main travelled roads up the valley.

Redirect examination:

The cattle that I have referred to were sometimes on the track and sometimes on the right of way and sometimes on the public road. There is quite a strip between the highway and the track on the north side where there is herbage or grass. There is no grass right on the track; there is grass along the right of way. I have not said that from my experience up there and my observation that cattle would be on the track every day of the week and every day of the month; sometimes there would be, and I would see them on the track, sometimes I wouldn't. As regards the place between those two roads, during the winter season after the farmers and stock-
29 raisers had taken up their cattle and were feeding them around the barns, of course I wouldn't notice any stock on the track there then. When I refer to the track I do not refer to the space between the rails, but to the right of way. The country in the valley is practically level. Back, tributary to the valley, you come across the hilly country.

Recross-examination:

The road running along on the north side of the track—the public road—is rather a broad road and well worn; it is used considerably. After a rain it is all cut up. Where the road would be travelled of course there would be no grass. I would say that from the northerly side of the public road shown running parallel to the railroad track down to the railroad track would be a distance of about two hundred feet, something like that, two hundred and fifty feet.

(Witness excused.)

ROBERT MCCAULEY, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination:

I am at present a conductor in the service of the Great Northern Railway Company, as a freight conductor, and I have been in road service on the Great Northern ever since August 28, 1908.
30 In the commencement of my railroad service I started out as braking. My railroad experience has had to do with the moving of trains. I knew Mr. Hall, the deceased, named in the complaint in this case, in his lifetime; knew him over two years before the month of October, 1911. During those two years he was a conductor. I worked for him on work trains. As near as I can remember, the work trains must have started in about May, the last

part of May, 1911. That was the first time that I worked under Mr. Hall. Thereafter I continued working for him until he got killed. I started out to work for him with a work train at Essex; that is about fifty miles east of Whitefish and on the main line of the road; we were unloading gravel to ballast the track. We continued to work on the main line until about the first of October, as near as I can remember; I couldn't swear to the exact date. During all of this time we did not put in all of our time ballasting; we also loaded ties on the main line before we came down here on this Kalispell-Marion branch. When we loaded ties on this branch they were left at the stock yards, or here in Kalispell. I couldn't swear of my own knowledge what was done with those ties after we left them at Kalispell. We loaded ties on the Marion Branch, and the ties after we loaded them on that branch we brought them to Kalispell and left
31 them here, and they evidently afterwards went to Somers. I could not have any personal knowledge of the fact that they went to Somers; I never took any of them to Somers. We brought them to Kalispell and left them here in Kalispell, and they were taken up by somebody else and some disposition made of them. There is and was in October, 1911, at Somers a tie treating plant, a tie treating plant used for increasing the life of the ties, I guess; the treating of the ties makes them last longer; they are immersed in some kind of liquid preparation.

While we were working on the main line we used different places as our headquarters; we tied up at different places, at any place that came most conveniently, but when I was loading ties on the main line most of the time we tied up at Columbia Falls. We just loaded the ties; we had nothing to do with treating the ties. We left our work on the main line about the 2nd or 3rd of October, and got on this branch line extending from Columbia Falls through Kalispell to Marion about the 2nd or 3rd. This Marion line connects with the main line at Columbia Falls and extends to Marion. They run trains on that Columbia Falls-Kalispell-Marion line.

Q. And these trains what—or what did they carry in the month of October, 1911?

32 Thereupon it as stipulated between the parties to this action by their counsel of record that one train, numbered 375, was run from Kalispell to Marion on Tuesdays and Fridays, which was a mixed train leaving Kalispell at 1:10 P. M. and arriving at Marion at 2:40 P. M. and leaving Marion at 3:00 P. M. of the same day, and arriving at Kalispell at 4:30 P. M., the train east bound to Kalispell being numbered 376. That said train was operated on the round trip on Tuesdays and Fridays; and that that train from time to time carried merchandise that would be shipped by people on that Marion Branch in the regular course of business to points outside of the State of Montana, and likewise they received shipments of merchandise from points outside of the state of Montana to themselves at their ranches on this Marion branch by means of said trains, and said trains were the only trains, other than work trains, operated on said branch.

The facts referred to in this stipulation refer to conditions at all times stated in the complaint.

Witness, continuing: What runs Mr. Hall had before May, 1911, I could not say. When we were working on this Marion branch I was working as brakeman. The work of the crew consisted in loading ties. We went on this Marion branch to that part thereof
33 west of Kalispell and beyond the point where the Somers line comes in about the 6th or 7th of October, 1911. From the first of October, 1911, until the 6th or 7th, we worked just west of Columbia Falls on the branch, and we worked at La Salle, and we worked on the Somers Branch—we loaded some there—and then we went up to the Marion branch from Kalispell to Marion. There would be, I should judge, between twelve and fifteen men constituting the crew engaged with us loading those ties. When around Columbia Falls we tied up at Columbia Falls. When we worked at Columbia Falls at first, for the first few days we loaded right at the "Y" at Columbia Falls, about three-quarters of a mile, or may be a little more, from the station; and on other occasions we worked at different distances on different days, some days toward the last we got down as far as La Salle and had to go back to Columbia Falls to tie up; Columbia Falls would be five and ninety-two hundreds miles according to the time card from La Salle. We continued work on the Marion branch from the time we started in, on the 6th or 7th of October, until the time that Hall was killed. When we went down on the Marion Branch to load ties we took some empties with us for loading purposes, on which we would load the ties, but I could not say just how many we took. In addition to the empties to be used for loading ties, we took two outfit cars. The outfit
34 cars were used for living purposes by us and the crew. There were more than two of them, if you count the extra gang's car and the caboose, and the car of coal that we used for carrying coal when we tied up at night. When we left Kalispell for the purpose of going out there on the Kalispell-Marion branch the engine was in front of the train and was headed West, and the caboose was at the rear end of the train. There were only two days in the week when trains moved on this Kalispell-Marion branch. As the loading was being done our train was most of the time on the main line and not on the siding. After our work was done in the evening, as a rule we backed in, we backed in most of the time. We had to back the engine up anyway. Sometimes we ran around the train and pulled the train back; sometimes we didn't; it would depend on where we were at the time. When we got where we could do so we would run the engine around the train at the siding and pull the train with the engine. I could not swear to any instance from the 7th of October until the 11th of October, 1911, when, in coming into Kalispell, the engine was in front of the train backing in; I couldn't swear to our having come into Kalispell from the 7th up until the 11th. The conductor of a work train like that keeps a book showing what is being done by the train. In the movement
35 of a train of that character it is entirely under the control of the conductor; the engineer shares the responsibility with

him to a certain extent; we are both under the conductor. During the time that operations were being carried on on this Marion branch by us, Conductor Hall kept a record as to where he stopped in the night time and where he worked in the day time, and so on. I couldn't swear to the times that we were in here in Kalispell, from the time we went on this Marion Branch until Hall was killed. It seems to me that we came in once, but I wouldn't swear to that. And the other times we put up at Kila. However, on the 11th of October, the night of the accident, we were coming into Kalispell to get more empty cars, to load with ties; we had no more empty cars. In the case of train operations, the caboose is taken along for us to ride in on the rear end of the train. It is practically the living place of those who are entitled to occupy it, when the train is in motion. As a rule, the conductor rides in the caboose or anywhere else where he sees fit. In the light of my experience, yes, sir, I know that there is such a thing as the train getting off of the track by reason of obstruction. I think that cattle upon the track are likely to get a train derailed—they are liable to derail a train. In the case of a derailment of a train, for instance, by reason of cattle being on the track, the likelihood of derailment is
36 greater or less according to the speed of the train. A train would be more likely to be derailed when it was running twenty-five miles an hour than when it was running eight or ten miles an hour. It is my experience, yes, sir, that a cow upon the track may or may not derail a train. There is no particular way by which you can tell when the cow is going to derail the train and when it isn't; you can't tell until after you hit them. If your engine is ahead of your train facing west and your caboose is in the rear or to the east and you are desirous of going in an easterly direction, and desire to get the engine around to the easterly and to have the engine facing east, unless you can get to where there is a turn-table or "Y", you couldn't turn the engine. If you are not going to turn the engine, or can't turn the engine, and after going west, it becomes necessary for you to go east, and move your train to the east, you have to back the engine up; you have to get the engine at the other end of the train, but you would have to back the engine up. In the event that you put the engine at the easterly end of the train and then back up, with the engine backing up, the tender would be in front as you proceeded. When an engine is backing going east with the tender at the east end of the engine the engineer hasn't got as good a view backing the engine up as he has when the
37 engine is going ahead. That is true of this particular engine anyway. If your train has been going west with the engine at the front end and headed west, and you want to go east, the engine can be placed at the easterly end of the train by making what you call a flying switch, what we call a drop. We have always made flying switches ever since I have worked on the railroad. I haven't seen any rule against that, or any prohibition, so far as I have been advised. We have always done it. I don't know of any rule against it. I was never told not to do it.

On the night of the accident we started at Kila. I do not know

exactly how many cars were on the siding at Kila at that time, but there was room to make a drop of the cars, The switch was not a blind switch, but it was connected with the main line at both ends. If your train had been going west, with the engine headed west at the west end of the train, and you wanted to make a flying switch at Kila, or a drop, you would back your train, engine and cars, and all, east of the east switch at Kila. You would then start and run ahead so as to get the train in motion, and would then cut the engine off from the cars and run it ahead of the cars, while the whole train engine and cars, were moving, until the engine going west got over the east switch, and then after the engine passed over the
38 switch and down the main line, and before the cars reached the switch, you would throw the switch so as to turn the cars into the siding. It is not necessary to have a grade so that the cars would gravitate from the main line into the siding; you give them start enough with the engine so that they will roll into the siding after the engine has gone by up the main line and the switch has been thrown to turn the cars into the siding; if you give them a start they will roll into the siding after the engine has been cut off. After the cut between the engine and the cars is made the engine runs ahead and pulls away from the cars and continues down the main line, and then the cars, after the switch is thrown, roll into the siding. The cars are given a start by the engine before the engine is cut off from the cars and before the engine gets away from the cars. During the six or seven days that we were there on that Marion line, no, sir, I couldn't swear to any particular time when we made a flying switch. During the time that we were on the main track, after the month of May down to the first of October, I can't remember how many times we made a flying switch or drop. Whenever we were between sidings we would have to back up to a siding any way, but as a rule we wouldn't back up beyond sidings; as a rule
39 we wouldn't go beyond a siding before putting the engine in front of the train. There were times when we didn't back in, but there was a good portion of the times that we did. I couldn't swear to the time exactly. Different times during that period when we were working for Hall though, working on that work train, in the month of May.

Q. Don't you remember yesterday evening when I was talking to you down in Logan & Child's office, Mr. Stevens being present, and Mr. Fisher being present, you said that during all the time that you backed in, as you were doing this night in question?

A. Yes, sir, when between sidings. We would have to back at least to a side track.

Q. No, without any sidings at all.

A. Yes, we backed in to here most of the time, but as a rule we wouldn't back by sidings. We wouldn't go beyond sidings most of them places.

I have not talked to other people about this case since talking with you yesterday evening. On the day of the 11th we were working west of Kila. We had come into Kila early in the evening. I

couldn't say how many cars we had out loading that day. I don't remember just exactly what date it was before that that we had been to Kalispell. I do not remember when last before that we went out from Kalispell with cars or how many cars we had.
40 I remember there was room at the siding at Kila to make the flying switch there, but I don't remember how many cars were in there. It is easier to remember the room than it would be the number of cars. I remember that we put the cars into the siding at Kila from the west end, and besides the cars that we put there that evening there were other cars in there on the siding at Kila. The cars that we put in there that evening were between the engine and caboose in our train as we moved into Kila. To get them into the siding we cut the train and shoved the cars into the siding. I do not remember what time we left Kila; it was getting dark when we left there; it had commenced to get dark in the evening. Of course, when we cut the train on the main track and put a portion of the train, consisting of the cars loaded with ties on to the siding, a portion of the train remained on the main line. We just put the caboose and two cars clear of the west switch at Kila on the main line, and then shoved the other cars that we wanted to leave at Kila into the siding by the west switch. I could not say whether we stopped the night of the tenth. It seems to me that on the night of the tenth we stopped at Kila. We then got on the siding. I never remember of tying up on the main line over night at any place. I could not say at which end of the siding at Kila we tied up
41 on the tenth, or from which end of the siding at Kila we started out on the morning of the 11th to go west of Kila. We had been at Kila at different times during the 11th making switches. I don't remember being at the east end of Kila on that specific day, October 11th, but we were at the end of that siding and could see the whole length of the siding. I know that there was room in that siding for the engine and those two cars, because we had been in there and we could have pulled the cars to either end that we wanted to. They were in there when we tied up there. If there was room for us to tie up in there, that would give us room to make the drop. I would swear there was room enough for a flying switch at that siding. I saw it with my eyes. When we were in there to tie up that would give us room enough; that would be enough. We were in there to tie up the night before. We were in there to tie up the night that we tied up there. I don't remember leaving Kalispell on the 10th; I don't think we did leave Kalispell on the 10th.

On the evening of the 11th, after the loaded cars were put into the siding, and on the west end of the siding, I remember they coaled up the engine there that evening, if I remember right the men coaled up the engine there that evening. I myself was out making a switch. I was not in the caboose; I was out probably do-
42 ing some work in connection with the operations that were being carried out. After that the engine coupled up to the two cars in front of the caboose, and then, yes, sir, it was "All aboard," and we started for Kalispell. I was in the cupola; I got

to the cupola soon after the train started; it is more than likely that I was probably in the cupola when the train got to the east end of the siding, but I don't know. We kept on with the caboose ahead of the train until the derailment occurred. We were then running about ten or twelve miles an hour, as near as I could judge. There was no facility there for turning the engine around so as to get it regularly ahead of the train, and headed east. There was no place on that Marion line where the engine could be turned around when it was headed west and made to head east, unless at Marion, and I don't know what was at Marion because I was never out there. On the 11th, after the train started for Kalispell, it must have been about 7:15 or 7:20, perhaps a few minutes later, when we started for Kalispell. I wouldn't swear to the time though, because I don't remember. At the time that Mr. Rae and Mr. Hall and Fred Fisher and myself were in the caboose. The only light we had that night except our lanterns was the fusees Mr. Hall had been lighting himself.

Some of these fusees burned red and some of them yellow.

43 When I got in the cupola, Mr. Rae and Mr. Fisher got in the cupola; at any rate, they were in the cupola at the time of the accident. We had air brakes on that train, working on the caboose, and I don't remember whether it was working on the outfit cars or not. The conductor's valve in the cupola of the caboose could have been used to advise the engineer as to conditions. That would be done by setting the air, so that he would know. There was an agency available to the fellows in the caboose to stop the train. They could apply the air themselves in the caboose. The air was, in fact, applied from the caboose.

As regards when I learned that there was something wrong on this trip to Kalispell, somebody hollered; I thought it was Mr. Hall, some of them thought it was Mr. Rae, but I don't know which one hollered, but there was somebody hollered. The air was then applied to stop the train. When I last saw Mr. Hall we were leaving Kila and he was down in the other part of the caboose and I was in the cupola. I did not see him after he lit the first fusee, but I know he was down with the fusees. He was down there below. Whether he was inside or outside of the caboose at the time I couldn't swear. I could not swear whether he was holding the fusee in his hand or whether he had stuck it in the end of the caboose. We came from Kila

44 to about a mile west of Batavia. I couldn't swear to how much it is; it must be somewhere about four or five miles. The fusee would throw some light upon the track. As I was in the cupola I couldn't see very far, but I could see aways with that light, but it wouldn't be very far.

This alarm was given, and the train was stopped soon after the alarm was given. I then got out of the caboose to see what we could do. I then found Conductor Hall lying in front of the engine—that is, I didn't find him. That is where he was found. Some of the other crew found him first,—some of the rest of the crew. He was dead when I saw him. I was not the first to see him; some of the other boys saw him before I did. I don't know who found him first. The caboose was turned over on its side. The derail-

ment was caused by striking a cow. After that we came into Kalispell and brought the remains.

Cross-examination:

Our work with that train consisted of loading ties. Those were ties that had been cut by farmers in the neighboring hills and left along the right of way, and they were to be picked up and taken to the tie-treating plant; that was the intention; they represented the hewn timbers that had been left there by people that had
45 cut the ties and hewn them down. And that is all that we had been doing there at all: we were just loading ties. When we left Kila for Kalispell on October 11th our train consisted of an engine and caboose and two cars that they used to stay in and sleep in and eat in, and a crew was on the train, and we were going to Kalispell to get some more empty cars to take out on the line and load with these ties again. That was all that our work consisted of; that was all that we were doing while we were on this Marion branch. The Somers Line comes out of the Marion line at the edge of town just west of Kalispell.

I am a freight conductor. In the course of the operation of trains cattle have been struck different times; we strike them quite frequently on the east end of the division, down around Browning, through that country. I do not know of any derailments that have been caused by the striking of cattle that I have been connected with other than in this Hall case. In the last fifteen years I know of no derailment of an engine on the Kalispell division by reason of the striking of stock. When I say that cattle are likely to derail a train I mean that when we are backing up like we did that night on the Marion branch, if we hit them they are likely to derail a train.

When you are backing up with the caboose at the rear of the
46 train, if you strike cattle it is likely to derail the train, or if you strike a bunch of cattle going ahead that could do it too, but I never knew it to do so. The pilot of an engine is on the front end; that pilot it also called the "cow-catcher." All engines are equipped with cow-catchers at the front. When an engine is backing with the tank at the rear there is a footboard at the rear of the tank; there was on this particular engine involved in this case; not a cow-catcher on the rear of the tender, but just a foot-board that rests pretty close down to the rail. As regards to backing up a train with a caboose at the rear, I would not like to back up that way any more than I had to.

After we hit the cow we only went about the length of the two cars and the engine and the caboose. Mr. Hall's body was found right in front of the engine. I was in the cupola of the caboose looking out; we were looking out for whatever might have struck the train.

Q. Had you seen any stock along there while you were working?

By Mr. Nolan: We object to that as not proper cross examination and as constituting a part of the defendant's case.

Which objection was, by the Court, sustained, to which ruling of

the court the defendant, by its counsel, duly excepted, which said exception was then and there duly noted and allowed.

47 Mr. Veazey: We offer to prove by the witness in his cross examination at this time that while operating on the Marion branch from Kalispell to Marion they had been bothered more or less by cattle being on the track, having had frequent occasions to stop for them, and they were in plain view on the right of way feeding and that on this particular occasion he was in the cupola looking out for the purpose of ascertaining the presence of cattle on the right of way.

Mr. Nolan: Of course, as to the latter portion of it, he has testified about that. I wouldn't object to that. He asked him if he were looking for cattle and he said he was look- out for any obstructions that he might encounter. As for the balance, I object for the reason it is a portion of their case. It is directed to the issue presented here as to the assumption of risk, and therefore isn't proper cross examination.

Which objection was by the Court sustained, to which ruling the defendant, by its counsel, duly excepted, which said exception was thereupon duly noted and allowed.

Witness continuing: If you have a train near a siding, consisting of an engine headed west with some cars to the east and a caboose at the east end of the cars, and you want to make a flying switch of those cars and get them and the caboose into the siding, and you were west of the siding, the first thing you would

48 do would be to back up east of the siding; the next thing, if they had air in them, would be to let the air out to get the brakes off of the wheels. The engineer starts the train and starts them rolling; he pulls ahead with the cars, after he gets them rolling he gives them a start enough so that they will roll by after the engine is detached, and then the pin is pulled between the engine and the cars and the engine pulls away from the cars far enough so that you can throw the switch after the engine has passed over the switch and let the cars go into the siding; the engine goes over the switch down the main line into the clear before the cars come to the switch and then you throw the switch and the cars are turned into the siding; or you can send the engine into the siding and then throw the switch and send the cars into the main line; that is called making a drop. It is a standard railroad practice which we are doing right along.

Redirect examination:

I have been a conductor since a year ago last June. I don't think since I have been running that I have really struck a cow; the engine might have struck them, but if they did I never knew it. I only know of my own knowledge going back a year or two of two instances where cattle were struck; this instance was one of them, and the other one was at Baynes, but I don't know what date

49 it was that we struck cattle at Baynes, where they were struck by the engine, and the engine was going fifteen or

eighteen miles an hour. As a rule a cow-catcher will lift an animal off the track. I do not think the foot-board would take the place of a pilot; I do not think it would throw an animal off the track like a cow-catcher.

Q. And of course, if the animal remained on the track and wasn't thrown off, and the tender was coming upon it, there would be a likelihood, wouldn't there, that the tender would be derailed, just the same as the caboose?

A. Why, the tender is heavier; it might not.

Q. Outside of the heft?

A. Outside of the heft?

Q. The lik-lihood would be the same in both cases?

A. If they were the same weights, yes.

Witness continuing: The pilot has a projecting point and widens out as it goes back. The effect of that would be to lift the animal and brush it aside, being down close to the rail and would extend right across. I have always made flying switches; I haven't seen any rule regarding that or prohibiting it. I couldn't swear to any particular time when I remember that the Superintendent was present when I was making a drop. When I said that I never was prevented from doing so I could not swear that I was ever
50 in the presence of anyone who has authority to prevent me, but I expect there have been times when superintendents and other people have been around to stop us if they wanted to.

When I said that it wasn't customary for us to back up our train I meant that we did not back any more than we had to—any further than we had to. I have never been a conductor of a construction train; about the only work-train experience that I have had was during the time that I worked under Mr. Hall. I think a running switch and a flying switch are the same thing.

Recross-examination:

A foot-board would prevent stock from getting onto the wheels if it didn't break off, but as a rule, a thing that heavy is more than likely to break the foot-board off. The foot-board is just what you stand on; but when the caboose is backing there is nothing to prevent the wheels from mounting the animal.

Redirect examination:

There is a possibility that in rolling around the footboard, the footboard may get on the animal, if the animal didn't break it off.

(Witness excused.)

G. L. STEVENS, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

51 Direct examination:

My name is George Stevens; I reside at Whitefish. I have been in the employ of the Great Northern Railway Company

for about the last eight and a half years; my present employment is as an engineer. I was employed by the Great Northern Railway Company in the month of October, 1911, as an Engineer. I knew Mr. Hall in his life time. Before October, 1911, when Mr. Hall was killed I was his engineer in March or April off and on until October, 1911. He was then engaged, from March or April, 1911, until October, 1911, in different things in work-train service. This would mean hauling ties, or hauling gravel, or piling snow fence on the east end. He would be running a work train.

Before we got on the branch running to Marion he was working on the main line between Columbia Falls and Belton and between Columbia Falls and Half Moon. I think he commenced to direct his work to the loading of ties in September. Before that he was hauling gravel to use for ballast. I think he began to work on this Marion Branch west of here (Kalispell) about the 6th or 7th of October, 1911. Before that he was working East of here between Columbia Falls and Kalispell, and out of Columbia Falls, and on the Somers line. During the time that he was working on this branch line the work was chiefly directed to loading ties.
52 After the ties were loaded they came to Kalispell and that was all we had to do with them.

I don't remember the first day that we went up to Kila from here. From the first time that we went up to Kila out of Kalispell until October 11th, the time of the accident, I could not say how many times we returned to Kalispell; I think we stayed up there one night, I think that was all. During the balance of the time I think we came in here to Kalispell; In coming in we backed in; and during the time that we were on the main line and also on the branch line east of here, when we were getting into the town that we left in the morning we generally backed one way; we would have to back up one way, either back out or else back in. There was no accommodation along the line so that the engine could be turned around at each station,—only at Kalispell and Columbia Falls that it could be turned around. I think there is no particular danger attendant upon making a flying switch, if you have plenty of room to stop the cars in. As to whether the grade sometimes figures as to the possibility of making a flying or running switch, if the grade is down they don't give so much of a start, so you will be able to handle them. If the grade is down and we simply detach the engine from the train and remove the brakes, if the
53 grade is sufficient the cars will move themselves.

I was operating the engine on this work train at the times that Macauley was working as brakeman on the train.

As regards whether I remember any incident while we were operating on this branch line west of Kalispell when, for the purpose of geting the train into town we made a flying switch to get the engine ahead of the train and run in to Kalispell with the tender foremost, I think we did one night up there. I do not remember how it became necessary to do this that night. I do not know whether there were any peculiar conditions which necessitated that being done on that occasion. They would always tell me what they wanted me to

do and we would go ahead and do the work. I was under the direction of the conductor. Whitefish is the division headquarters. We headed into Whitefish,—just took the engine and left the outfit at Columbia Falls, and then went in to get work done on the engine, and then went back out of Whitefish the next morning. From the 7th or 6th of October up to the 11th of October, the night of the accident, I do not remember how many times during that period we came into Kalispell. On the night of the accident we started from Kila, about 7.40 or 7.45; it was then kind of dark. We then had the engine at the back end of the train with the
54 caboose ahead. The derailment occurred about a mile and a quarter west of Batavia. The way that I was advised that there was trouble was that I saw the caboose go off to one side of the track; that was the first that I knew of it. The train stopped itself; I shut the throttle off and the train stopped itself. They had used the air on the caboose and that stopped the train. I went back myself, yes, sir, to ascertain what occurred. When I got back there I found the caboose was off and one pair of trucks on an outfit car. Hall's body was lying between the rails about the center of the track. At that time he was dead. The cow was killed and the body of the cow was about a car-length of there, I think, off the track on the north side.

In my experience as a railroad man, trains are sometimes derailed, yes, sir. Obstructions on the track, such as cows or horses, may derail trains. Within my experience, I have not known of an engine being derailed by striking animals on the track; that is not within my experience. This one derailment is the only one that I know of that was occasioned by animals on the track. If you assume that a train is going at 10 or 12 miles an hour, or at the rate of 30 or 35 miles an hour, and strikes an obstruction like a cow, the lik-lihood of derailment would be greater with the train going at 35
55 miles an hour, if they were derailed at all. As to whether the lik-lihood for derailment would be greater the faster the train was going, I think that would depend upon where the cow lit after you hit her. As to whether, if you are going 30 or 35 miles an hour, and come in contact with a body you are more likely to throw it off the track than if the train is going slower, I can merely answer, it might and it might not.

Cross-examination:

At the time when the accident was about to happen the train was going 10 or 12 miles an hour. I have been a railroad man twelve years connected with the movement of trains.

W. E. Stevens, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination:

My name is W. E. Stevens. I am the Agent of the Great Northern at Somers and have acted as such down there for the last four and

a half years. I was there in the month of October, 1911, and for some time before that. I bill out shipments of ties that are treated in that plant there. That plant is operated by the Great Northern Railway Company and is not an independent concern.

In connection with the shipment of ties out of Somers after they are treated they are sent to various points on the system.
56 By "various points on the system" I have reference to the railroad as it is operated between St. Paul and the Puget Sound. I think we have sent some of these ties over to the country around Helena. The ties are used for renewals and for the construction of new lines. They are shipping ties there at Somers all the time. As the business is carried on there under my observation, these ties, yes, sir, are taken down there to Somers and treated, and then sent out for the purpose of being used in the maintenance and repair of the road and for the building of new roads. I do not know where, for instance, those ties that were collected along the Marion Branch on the 11th of October ultimately went to. I don't think any of those ties treated down there and shipped out go to other lines; I think it is all used for Great Northern purposes. Some is billed out on a revenue billing, of course; that is due to its being consigned to contractors in those instances. Yes, sir, the ties are sent out to be used in connection with the line of railroad owned and operated by the Company.

Cross-examination:

I do not know of any instance where those ties have been shipped, if at all, to the Oregon Trunk Line, or the Northern Pacific or the S. P. & S., no, sir; I know of those ties being shipped to the
57 Montana Eastern; I don't recall the Great Falls and Teton County Railway Company; I don't recall the Montana and Great Northern Railway Company either. As regards whether I recall, without remembering the names, of instances where shipments have been made to other companies other than the Great Northern, but which are closely affiliated with the Great Northern, I only know of where they are shipped or were shipped to contractors is all. I know of instances where ties were shipped to contractors who had contracts for constructing new lines for the Great Northern. In those instances they are shipped under a revenue billing and freight is charged the contractor. No, sir, I know of nothing to prevent them doing anything they want to with those ties while they are at Somers.

Redirect examination:

A. No, sir, I never knew them to give away any of those ties to use for fire wood for the poor of Kalispell. The ties are intended to be used in connection with railroad operations of some kind, yes, sir. Yes, sir, those different lines of railroad that my attention has been called to are lines of railroad that are allied with the Great Northern to some extent, and between whom, if the lines are not owned by the Great Northern, traffic arrangements exist, and over those lines of road people from different states are carried,
58 and merchandise from different places moves, yes, sir.

ROBERT MCCAULEY, being recalled as a witness on the part of the plaintiff, testified as follows:

Direct examination:

I gave a statement on the 19th day of October, 1911, eight days after this accident. As to whether my recollection then, at the time I made this statement, was more vivid as to track conditions at Kila than it is to-day, I may have remembered better then. The signature on that piece of paper is my signature. I swore to that before Mr. Greene as Notary Public.

Q. Now, you made this statement then, did you not, in this affidavit: "That the passing track at Kila was blocked?"
A. There were cars in there, but I meant——
Q. "And they were backing up toward Kalispell, where they were going to tie up that night."
A. We were going to tie up at Kalispell that night.

The passing track means the siding. When I said that the track at Kila was blocked I meant that there were cars on it in the clear. We could have shoved the cars out. We could have got by the cars at Kila is what I am trying to tell you, if it had been neces-
59 sary. Of course, I have to take the conductor's instructions on that work, and do as he says.
By the expression that the siding was blocked I meant that there was cars in there on the siding so as to prevent us running around the train. That was the sense in which I used it. Yes, sir, it was so blocked that there wasn't any chance to run around the train. You couldn't run around it, no, sir; we could have switched it out; we could have made a switch on it and put in the cars. Of course, we could have run around the siding, but we could not run around the train, because the cars blocked the siding; as the siding had cars on it we couldn't run around the train.

Cross-examination:

Q. That is, the cars on the track would prevent you from going——
A. Through the siding, is what I meant.

IRWIN PHILLIPS, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination:

My name is Irwin Phillips. I am now employed at Columbia Falls. In the month of October, 1911, I was employed by the Great Northern Railway Company in running a tie loader. I have followed the railroad business about three years. I haven't been rail-
60 roading now for a year. Before I took up railroading I had been running a stationary engine. I was running the tie-loader for Mr. Hall. Before he got killed I had been working for him about three months. During that period Mr. McCauley was one

of the brakemen. On the day of the accident the train crew consisted of Jack Hall as conductor, and Bob McCauley and Tom Rae as brakemen, and Shorty Stevens and I. B. Stevens were the fireman and Engineer. No, sir, I was not with the crew at all times when it was engaged in doing ballast work on the track. I was not with them at all when the crew was engaged in doing ballast work on the track; I got on when they commenced to handle the ties. I gathered up those ties along the main line of the road and also on the branch lines, yes, sir. I don't know exactly when it was we commenced to gather the ties in the neig*bh*orhood of Kila. I think it was along about the sixth or seventh of October. Before that time we were gathering up ties on the main line and between here and Columbia Falls and between Kalispell and Somers. As a usual thing while we were out on this train we used to stop at Columbia Falls when we was on the main line betwen Belton and Whitefish; betwen here and Columbia Falls we used to stop mostly at Columbia
Falls, because the engine crew had to go to Whitefish. When
61 collecting ties on the Somers Branch we stopped here at
Kalispell. When we went out in the morning, say east of here, or out from Columbia Falls and went west, the engine was almost always headed west. Then when we backed in in the evening we got into our quarters for the night by mostly always backing up, and in backing up the caboose most of the time would be ahead.

During the time that I was with the outfit we would not stay on the job without getting into night quarters at all, no, sir, we always come into Kalispell or stayed in Kila when we was out there. On the day before the night of the accident I think we were working west of Kila about two miles. I think about two days before that we had been into Kalispell for the purpose of taking out a supply of cars. I am not sure about that. In the loading operations which were being carried on, about six or seven cars would be used up in loading every day with the crew which we had. On this Marion Branch we loaded both from the siding and from the main line.

These ties that we gathered up were in piles along the track. After these ties were loaded I do not know what disposition was made of them to my own knowledge more than that they were brought into Kalispell here. I don't know what was done with them. That is,
after we put those cars on a siding some train would come
62 along and pick them up, and that is all I know about them.
I do not know the length of the siding there at Kila. On the evening of October 11th I know there were some cars there on that siding, but I couldn't state as to how many. When we started to come to Kalispell it was getting dark. When our train moved out of Kila I was in our boarding car, one of the out-fit cars; I was not in the caboose. I became advised of the fact that there was something out of the common which had happened, because one set of the trucks of our car was derailed and jumping along on the ties. I could not tell you approximately how fast we were running at the time. As soon as the train stopped I jumped. I saw the caboose was gone and looked up and saw it was turned over, and I ran up there to see if anybody was hurt. The caboose was turned over. The body

of Hall was almost opposite the cab, a little bit east of the cab; it was on the track right in front of the engine. The man's leg had been cut off. I was not the first man that got to him. Seemingly, the caboose was derailed by reason of colliding with a cow, yes, sir. I think the cow was a hundred feet or more west of where we found the body of Mr. Hall. The cow was dead, too, yes, sir; its leg was cut off and its neck broken, I believe, and cut.

During those times that I was operating on the main line
63 east of Columbia Falls I was gathering up ties there, too, yes, sir. Travelling on the main line of the road, and coming into Columbia Falls, when we did come in, this practice of backing up was not observed so much on the main line, no sir. It was done when they couldn't get a siding. To the extent that we did back up was continued for, I should say, a couple of months before October 11th. At Kila there are no facilities where you could turn the engine around so as to get the pilot in front. I don't remember whether there was a headlight on the back end of the tender on the evening of October 11th.

Cross-examination:

Sometimes we brought the cars loaded with the ties after we had loaded them into Kalispell by that same work train. If they happened to be coming in they would bring in a few cars loaded with ties and take back empties. I could not say whether from October 7th to October 11th, with the exception of the night in question when we set the cars out at Kila, we at all other times during that period brought them into Kalispell on this work train leaving the loaded cars in Kalispell and taking the empties out; I could not say as to that; I don't know how long the siding is at Kila. I should think it would hold 80 cars, something like that; I don't know just how long it is. I wouldn't say whether whatever
64 cars were there were all down at one end, blocking one end.

Redirect examination:

There is a saw-mill operated at Kila, yes, sir. The saw-mill has a spur outside of the siding for cars that they use.

I. B. STEVENS, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination:

My name is Ira B. Stevens; I am working for the Great Northern Railway Company as a hostler at Whitefish. At the time Mr. Hall was killed I was fireman of the engine that was pulling his train. Before that accident I had been a fireman in the neighborhood of eleven or twelve days on that engine; before that I had been firing on the main line on through freight. During the eleven or twelve days that I was firing on this engine, the work being done by this construction train consisted in loading ties. While I was there only

one day was used in loading ties on the main line; that was the first day I worked there. The work was then, on that day, between Columbia Falls and Coram, and Columbia Falls and Half Moon. Coram is five or six miles from Columbia Falls; I don't know the exact distance. On that first day that I was with the crew
65 we went out to Coram with the engine headed west. When we came home that evening the engine was ahead of the train. We backed out and headed in. We had to back out. We didn't go clear to Coram. We were working between Columbia Falls and Coram; we did not go clear to Coram. That was on the main line, yes, sir. Yes, sir, we had to get off the main line during the day to make way for trains on the main line. When we went out in the morning leaving Columbia Falls behind us, the caboose was ahead of the engine. Coram is east of Columbia Falls. The caboose was ahead in the morning, and we backed out to our work, and then when we came in in the evening we came in with the engine ahead. There is a "Y" at Columbia Falls. You can turn an engine through the use of a "Y", just the same as if you had a turn table.

As my recollection serves me, we worked on this branch line from Columbia Falls to Kalispell, and west of Kalispell, for ten or eleven days. In going out to work and in getting back from work to where we were staying in the night time we would have to back one way; if we didn't back up going out we had to back up coming in, and if we backed out going out, we came in with the engine in front. West of here and in the direction of Kila the same practice was observed, yes, sir. I do not remember exactly what time it was when we left Kila on the night of the accident; it was
66 somewhere about 7:30. We were coming to Kalispell that night. There were some cars on the siding at Kila that night; I don't know how many there were, I don't remember how many. When we got to the place where the train collided with this cow, it was after dark,—it was then dark. After the collision took place I got out of the engine and went back to where Hall's body was, on the track. The caboose was then a little east of the body; the body was very nearly opposite the cab; the caboose was completely off the track. In addition to the caboose being derailed, one truck of the head out-fit car next to the caboose was also derailed. I remember the tender that was attached to that engine that night. We had a cage for a headlight, and had a lantern; we did not have a globe—we had a lantern setting in a cage at the rear of the tender. As we came in that night the tender was not the rear portion of the train; there were two outfit cars and the caboose ahead. The engine was at the west end of the train and headed west, and the tender was next to the engine. We had the tail lights on the caboose. There was a light on the tender, but of course the outfit cars back of the tender blinded it; we couldn't see by it. This light which we had on the tender was simply a lantern, not a regular headlight, but there was

a reflector there in the cage, and the lantern was in the cage.
67 I have had six or seven years experience in railroading; I never acted as a brakeman. My work has been mostly firing with the engine. During my experience I have never had a derailment. I have struck lots of cows. When I struck them we were on the main line, running either a freight train or a passenger train. I could not say that we were running pretty fast at the time when we struck them at all times. As to whether, in the instances where we struck the animals, we got them off the track or they stayed on the track and we went on ahead of them, generally they went off the track. About the matter, whether a derailment is more likely to occur when the train is moving slowly, say ten miles and hour, or when it is moving at the rate of thirty or forty miles an hour, I would say it depends on what part of the track the critter is standing on, a good deal, and how you hit it. If you suppose that the critter is standing right facing the engine, defying it, and you come on against it in that way, it is pretty liable to get knocked off.

Q. Well, you would be more likely to have them knocked off under those circumstances if the animal was across the track and the side of the animal was facing the engine?
A. Oh, not necessarily.

(Witness, continuing:) The tender we had that night had a running board like they use on a switch engine, and that ex-
68 tended clear across the tender, so that it would extend beyond the rails and almost out to the ends of the ties; it would be about four or five inches from the rail, that is, from the track, and about two inches above the rail. The space from the bottom of the foot board to the track would be a factor to be considered, as to whether or not colliding with an obstruction would be likely to result in a derailment. It would be pretty hard for any object to go over that foot-board and get under the train, under the tank.

Cross-examination:

This reflector that I spoke of was in the regular headlight cage on the rear end of the tender, and the reflector was in the cage, and the lantern was in the cage in front of the reflector. In our operations out of Columbia Falls towards Coram, we would leave Columbia Falls with the engine headed west, and we would then back out of Columbia Falls going east; we was only out about two hours the first day I worked; we were out only a little over a mile, so that, in that movement which was spoken of as a practice, no, sir, we never reached any siding; we didn't at that time, that was only the first day; that was the only time I was on the main line, that first day I worked. The same thing was true on the Marion
69 line, that if we couldn't get to a siding, we would then, of course, have to back; and if you could make a siding, or in some way get the engine around you would have to run

around. If you could run around you would run around, or get the engine at the other end, that was the proper way to operate the train, yes, sir, by running the engine around to the other end. I couldn't give you the exact number of cars on that siding; I don't know myself how long the siding is; I would say it would hold in the neighborhood of fifty cars. Whatever cars were there were mostly at the west end. Substantially, the siding was practically empty.

Yes, sir, I have struck many cattle in railroad operations and have had no derailments resulting therefrom. The likelihood of a derailment resulting from striking stock when the engine hits it head first is extremely remote. In my railroad experience I do not know of any railroad derailment that has occurred that way. After we came into Kila that night we took coal that night; we took the coal at Kila; that would be in the neighborhood of ten or twelve tons. As we looked back that night we saw the glare of the fusee approaching the place where the accident occurred. We had some water with us at the time of the accident, about half a tank.

70 Redirect examination:

To back up a train isn't the proper way to run a train. The headlight arrangement on the rear of that tender was the regular headlight arrangement except that the headlight was not there,—the regular headlight. The regular headlight could not be lighted at that time.

The car from which we loaded coal into the tender at Kila was at Kila. I could not tell you exactly the length of the siding at Kila. I cannot tell you how many cars were on the siding on the evening of the 11th. They were bunched on the west end. There were no cars on the east end. I could not tell you how many cars there were on the west end: I could not tell you how close to the east end they would come, no, sir, I am not sure. I could not remember how the siding looked; I didn't pay much attention to it at the time. The loading of the coal into the tender was done by the extra gang.

ROBERT BOOTH, being duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination:

I live west of here about seven or eight miles,—about a mile west of Batavia; that would be about three miles east of Kila, and about three quarters of a mile or possibly half a mile from where this accident occurred on October 11th, 1911. That country
71 is thickly settled through there, farmers occupying tracts of land along there. There is quite a good many cattle and horses there. There is no single one owning a good many but the cattle and horses are divided among different owners. Yes, sir, I know about this road running on the north side of the track between the two roads that intersect the track, there is a road there that

runs parallel to the track east and west, and then that road at one end runs up against the road and crosses the track on the east, and there is another one on the west. There is a stream of water running along there, which crosses the track and also runs along this highway. That stream is used considerably by cattle in that neighborhood for watering purposes. I do not know of any other water available for stock purposes other than this stream. As to whether during the time that I have been there any stock, cattle, or horses, have gone got on this track to my knowledge, I would say that there has been stock on the track; I would say that it was a frequent occur-ance; occasionally the cattle would not only be on the right of way but would get between the rails. There would be times when there wouldn't be stock on the track. The cattle that would be around there would come from the mountains, from the range, down to water, and from some of the neighbors that lived in that part of the country. These conditions would exist during
72 the entire summer months and for more than a year preceding the month of October, 1911. On Plaintiff's Exhibit A this meandering line is intended to represent the creek or stream of water as it is there, and the straight line represents the railroad, yes, sir, and the roads also are shown on the exhibit. I would say that there is seventy feet of space from the center of the road to the fence on the opposite side of the road that runs parallel to the railroad track there. On October 11, 1911, I would say that the distance from the middle of the road that ran parallel to the railroad track to the track where the rails were would be about fifty feet. Of that space the entire portion up to the road bed would be in grass in places. From the center of the road to the fence that was maintained there by farmers would be about fifteen or twenty feet.

Cross-examination:

Each farm there has its separate water supply; there would be a separate water supply on farms that that stream passed through; some of the farms also have wells. Irrigating ditches run through there; there are two irrigating ditches. Every farm in that locality had a water supply of its own that it could use without going outside of the farm. The farms in that vicinity are all enclosed farms.
Where this stream of water is used for the purpose of water-
73 ing cattle it is so used only where it runs through a ranch, then only by the man who owns that ranch, but there are a great many cattle that run loose that drink from that stream. In winter time they drive the cattle down there to drink in that stream. The farmers there take their cattle and turn them out in the road loose, yes, sir. Yes, sir, they turn them loose right on the right of way. The fenced farms extend for two or three miles away from the track.

CASSANDRA HALL, being duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination:

At the present time I am living at Calgary, Alberta. I am the widow of John P. Hall, deceased. I was married to Mr. Hall in Shelburne, Ontario, in 1892, July 13. I am forty years of age. Mr. Hall was forty-two years old at the time of his death. When I married Mr. Hall I had been acquainted with him about two years and eight months. When I first formed his acquaintanceship he was railroading. We have had five children. At the time of the death of Mr. Hall there was Aildeen, who was then eighteen years of age; Clarence, who was sixteen; Pauline, aged fourteen; Grace, aged twelve; and Dorothy, aged four. At the time of Mr. Hall's death all of these children were living at home. Out-
74 side of the earnings of Mr. Hall they had no means of support, and outside of the earnings of my husband I had no means of support. My husband was a man of some education. He tried to help the children as much as he could. He wished each of the children to have good mental training; he wished Aildeen to finish high school and possibly go further if she wished to, or follow whatever she would like to after that. I think that to keep those children and furnish food for them and clothing for them would cost about sixteen hundred dollars a year. No, that could be done for about nine hundred dollars a year, aside from the expenses of myself and my husband. At the time of my husband's death he was a conductor, and when I first knew him he was a brakeman. He was a very healthy man. In his employment he lost very little time. For the eleven days preceding his death I received as his earnings seventy five dollars, and for the month before that I received one hundred and eighty seven dollars as the portion of his salary earned during those times. The month before that he received two hundred dollars. For a period of about six months the average wage he would receive would be about one hundred and eighty dollars. I received for myself and the children, for the maintenance and the care of the family, about one hundred to one hundred and twenty five dollars each month, and
75 that amount was spent by me in my maintenance and for clothing and for the family. From the time that I was married to him he was not constantly in the employment of the Great Northern. I think he has been employed by the Great Northern on this division about two years or a little over. During that time he was a conductor chiefly on work trains, mostly on the main line.

Cross-examination:

I would not say that a general statement of my husband's occupations since August 16, 1897, was correct in the following form: From August 16, 1897, to June 30, 1898, a brakeman at Medicine Hat, working for the Canadian Pacific; from June 30, 1898, to April 1, 1901, a conductor; from April 1, 1901, to September 15, 1902, hotel business at Medicine Hat.

I don't know about the dates when he was on the Canadian Pacific; he went there first as a brakeman and was promoted to conductor shortly after that, and he went into the hotel business after that. I don't remember the year he went into the hotel business, I was living with him when he went in the hotel business. He didn't go into the hotel business in Medicine Hat. I don't know about those dates when he was braking and a conductor, I don't know whether they are right or not. He went into the hotel business in Ontario,
76 I think in 1902. After he left the hotel business he went back on to the Canadian Pacific. I don't think there was a period there when he was seeking employment after he left the hotel business. From October 5, 1902, to January 10, 1903, I think he was yard master for the Canadian Pacific. From January 15, 1903, to May 30, 1903, I think he did something along the line of being a salesman for a man named Thomas Arnold; that was in Ontario. I don't know whether from June 1, 1903, to September 25, 1903, he was a yard foreman for the Grand Trunk. I don't remember the date as to whether from September 25, 1903, to September 1, 1906, he was a brakeman for the Wabash. I don't remember how long he worked as a salesman; I don't remember how many months he worked as a salesman, or whether it was a year or not. In the three years from 1903 to 1906 he hadn't settled in any particular business; he wasn't very settled, I know. He was trying to settle again. I suppose that he was a conductor for the Great Northern from September 17, 1906, until October 1, 1908, I suppose that is the date. I think he then resigned from the service of the Great Northern on October 1, 1908; he got a leave of absence; and after that he was in the service again. From October 1, 1908, to February 27, 1909, he was a conductor and agent of the S. & B. C. Railway Com-
77 pany in British Columbia at Grand Forks, and on February 27, 1909, he re-entered the service of the Great Northern, or some time about then, possibly about March 11, 1909. During this period from 1897 to 1909 Mr. Hall was away from home sometimes; yes, he was away a good deal; railroad work always takes them away from home. And as a salesman he would be away from home a good deal of the time. In March, 1911, when he came back to the Great Northern on this Kalispell Division I was in Grand Forks. He used to send us his salary at Grand Forks until I came; I came as soon as school closed, which would be the latter part of June. I came in here to Kalispell; he was working in the mountains where there were no schools and I stayed in Kalispell here. Then during the school holidays I took the children to Seattle. Mr. Hall was very desirous that the children should have the best advantages, and it was his wishes that we should live in places where they could have the best advantages. Any place where I lived separated from him it was at his wishes and consent.

Thereupon there was offered and received in evidence without objection a statement signed by the deceased showing the work which he had done and his occupations from August 16, 1897, to February 27, 1909, as follows:

	From			To			Occupation.	Location.	Under whom employed.			What road or firm.	Reason for leaving. If discharged state why.
	Month.	Day.	Year.	Month.	Day.	Year.			Name.	Title.	Location.		
1.													
2	Aug.	16,	1897.	June	30,	1898.	Brakeman.	Medicine Hat.	John Niblock.	Supt.	Calgary, Alta.	C. P. Ry.	
3.	June	30,	1898.	Apr.	1st,	1901.	Conductor.	.....	.....	.....	.....	.....	Resigned.
4.													
5.	Apr.	1st,	1901.	Sept.	15,	1902.	Business.	Ingersol.	T. W.	Engr.	Medicine Hat	Hotel.	Resigned.
6.													
7.	Sept.	15th,	1902.	Oct.	5th,	1902.	Seeking employment.						
8.													
9.	Oct.	5th,	1902.	Jan.	10th,	1903.	Yd. master.	Nelson, B. C.	Wm. Downey.	Supt.	Atlantic, D. W.	C. P. Ry.	Resigned acct. sickness in family and suit.
10.								Ont					
11.	Jan.	15,	1903.	May	30th,	1903.	Salesman.	St. Thomas.	Thos. Arnold.	Gentleman.	Now dead.		Arnold sold out.
12.													
13.	June	1st,	1903.	Sept.	25th,	1903.	Yard foreman	London, Ont.	C. E. Costello.	Trainmaster.	Battle Creek.	G. T. Ry.	Resigned.
14.													
15.	Sept.	26,	1903.	Sept.	1st,	1906.	Brakeman & yardmaster.	Ashley, Inda.	J. J. Simms.	Supt.	Detroit, Mich.	Wabash.	Resigned.
16.													
17.	Sept.	17th,	1906.	Oct.	1st,	1908.	Conductor.	Spokane.	R. C. Morgan.	"	Spokane.	G. N. Ry.	
18.													
19.	Oct.	1st,	1908.	Feb'y	27,	1909.	Conductor. & agent.	Grand Forks, B. C.	F. Demuth.	"	Grand Forks, B. C.	S. & B. C. Ry.	Requested to resign No reason given.
20.													

(Signed) JOHN P. HALL.

79 Mr. Hall's headquarters while he was employed by the Canadian Pacific were in Medicine Hat; I think they were always at Medicine Hat. When he was employed by the Grand Trunk his headquarters were at Toronto. When he was employed by the Wabash his headquarters were at Ashley. When he was employed by the Great Northern his headquarters were at Spokane I think and here. He was a main line man; I don't know where would be his headquarters here. And on the S. & B. C. Railroad his headquarters were at Grand Forks.

HEBER L. BALES, being first duly sworn as a witness on the part of the plaintiff, testified as follows:

Direct examination:

I live here in Kalispell and am engaged in the fire and life insurance business I have followed the life insurance business ever since September 23, 1909. In connection with life insurance business tables of mortality are used. These tables are used for the basing of rates for the different kinds of policies that are issued. These tables likewise furnish the probable expectancy of human life. According to the American Experience Table of Mortality a man forty-two years old would have an average future life of 26.72 years. The table doesn't state whether there is any difference between men and women. A person forty years old has an expectancy of life of
80 28.18 years. A person eighteen years of age has an expectancy of life of 43.53 years. A person two years of age is not given any expectancy according to this statement; the table starts with a person ten years old. The expectancy of a person ten years old is 48.72 years, and the life expectancy decreases as you grow older. A life annuity purchased by a man at the age of forty two years would cost $1,790.40. If he paid an insurance company $1,790.40 the insurance company would agree to pay him $100.00 per year for his life. If the insurance company agrees to pay the sum semi-annually instead of annually, the cost is increased. If the $100 was to be paid semi-annually it would cost $1,817.40 instead of $1,790.40. An annuity for $200 a year would be double these rates, and so on, if you want an annuity for three hundred dollars a year, you would multiply these rates by three, and for four hundred dollars a year you multiply them by four.

Cross-examination:

My understanding of those tables is that if the Great Northern Railway Company were to pay to Mrs. Hall $1,790.40 and she were to turn that over to the insurance company, the insurance company would pay her one hundred dollars a year for twenty-six years. When I borrow money here I pay ten per cent. If Mrs. Hall
81 would give me that $1,790, at the end of the year I would pay her $179 for the use of that money; and anybody else would pay her the same rate and would pay her $179 for one year or two years or twenty-six years or as long as the loan was out and the stand-

ard rate of interest was being paid. If the loan continued for a hundred years they would continue to pay the $179 a year throughout the hundred years. Yes, sir, the insurance company pays $100 a year for twenty six years, but if Mrs. Hall loaned this out in this community she would receive almost twice as much—$179.00—year after year without limit, and upon her death, provided they were able to make the same loans and business in Kalispell was continuing that money would continue to earn $179 a year in favor of others. The insurance company keeps the $1,790 given to it by Mrs. Hall. If Mrs. Hall let me take the $1,790 I would pay her $179 a year and at the end of whatever time was fixed for the loan I would give her back the $1,790. The tables do not take into consideration any possibility that any particular person might engage in a war; the tables would still show that his expectancy of life was as stated in the tables.

CASSANDRA HALL, being recalled, testified on the part of the plaintiff as follows:

82 Cross-examination:

None of my children in 1911 were earning their own living. For two months the boy was employed with the Great Northern. I don't know what he did, something out on the train that his father worked on. He left home; I don't know where he is now. His daughters were not employed in Seattle at or prior to his death to earn anything. One of them worked for a little while and began to learn millinery, but she didn't like it; she is now working as a stenographer in Calgary, at home; she is getting fifty dollars a month. Pauline was working in a real estate office in Calgary; she was then getting fifty dollars a month; she is not working now. My son is now nineteen; when he was working for the Great Northern he was getting $75.00 or $100 a month, somewhere around near there.

Plaintiff rests.

Thereupon, at the conclusion of the plaintiff's case and when all of the testimony of the plaintiff had been adduced, the defendant moved the court for a judgment of non-suit and dismissal upon the plaintiff's testimony, as following:

Comes now the defendant in the above entitled cause and, at the close of the plaintiff's testimony and when all of the testimony of the plaintiff had been adduced, and moves the court for a judgment of non-suit and dismissal upon the merits, upon the testimony
83 aforesaid, upon the following grounds:

First. That the testimony adduced by the plaintiff does not constitute facts sufficient to constitute a cause of action.

Second. That the testimony adduced by the plaintiff does not show the violation by defendant of any legal duty owing to plaintiff's intestate.

Third. It appears from the complaint that this action is based upon the federal statute defining the liability of railroads for injuries

to, or deaths of, employees by reason of negligence, and the question as to the meaning of "negligence" under this statute, and as used in this statute, is necessarily a federal question; that the sole ground of negligence charged is a failure to fence the railroad track in question, and this question, therefore, as to whether any duty was owing to plaintiff's intestate to fence the track under the case as made in the complaint, must be determined as a question of federal law aside from any statute of the State of Montana; and under all the federal decisions and under the federal law, there is no duty owing to an employee to fence the track; and hence, there being no federal or other duty, there can be no liability under the federal statute, in the case as framed by the pleadings. As regards the Montana, so-called, fence statutes, they did not impose an absolute duty to fence,
and, by their terms and by their restrictions, contained in the
84 titles to the legislative acts of Montana, the duty to fence is not one which inures to the benefit of employees, or for a violation of which a cause of action can arise in favor of an employee, or his administrator, to recover damages by reason of his injuries or death; and such statutes, moreover, can have no bearing in an action brought under said federal law.

Fourth. It appears from the complaint that the sole ground of negligence charged is a failure to fence the railroad track in question. By the Common Law, there was no duty resting upon defendant in favor of plaintiff's intestate to fence its track; and, under the statutes of Montana, the original code did not create any duty to fence, but merely provided what fences should be erected by railroad companies if they did fence, and left the option with the adjoining farm owners to determine whether there should be a fence, and did not embody any obligation except in the case of adjoining farm owners, only, who owned farms immediately adjoining the railroad track; and subsequent amendments by legislative enactment, by reason of the titles of such acts being limited to liability for stock killed, cannot create a duty to an employee for the liability of the death of plaintiff's intestate, the title to such acts being insufficient to cover the case of damage to persons, or any damage or
liability other than damage or liability for stock. Hence, as
85 there was no legal duty owing to plaintiff's intestate, there cannot, in any event, be any negligence.

Fifth. There is a fatal variance, amounting to a failure of proof, between the allegations of plaintiff's complaint and the proof, which variance amounts also to a failure of proof in that it appears from the complaint that this action is based upon the statute of the United States defining liability of railroads, while engaged in inter-state commerce, to its employees, or their families while such employees are employed in such commerce; and it is alleged in the complaint that at the time plaintiff's intestate was killed, defendant was engaged in inter-state commerce, and that he was employed by defendant in such commerce; but the proof adduced by the plaintiff does not show or tend to show these allegations to be true; and, on the contrary, shows that according to the plaintiff's proof, the defendant was not at the time engaged in inter-state com-

merce; that plaintiff's intestate also was not employed in such commerce, but that at said time defendant was engaged only in intra-state commerce, if any commerce, and that plaintiff's intestate was employed, if in any commerce, only in intra-state commerce. The proof shows that the only work being done by the deceased was the loading of ties eft on the right of way by contractors who had cut
the same in the neighboring hills, and that these ties, as raw
86 material, were to be sent to the tie-treating plant at Somers,
where the raw material was to be treatted and manufactured into the finished product or tie, which finished product might or might not thereafter be used in commerce, inter-state or otherwise, by defendant or anyone else, and especially that the same might be used only in the construction of new lines not owned or operated by defendant, and in fact not in operation, but owned or being constructed by different companies other than the defendant. The work done by plaintiff's intestate was not in any way connected with any commerce, but was at most preparatory to, or anterior to, commerce later to be undertaken. The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the federal court, whereas, if the cause made by the proof had been alleged, to-wit, an intra-state case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the federal court, and a refusal to recognize such a variance permits the plaintiff to allege a cause of action under the laws of one sovereignty, to-wit, the United States, and
to maintain or seek to prove a cause of action under the laws
87 of another sovereignty, to-wit, the State of Montana.

This motion is based upon the complaint of the plaintiff and the records and files in this cause, and upon the testimony aforesaid.

Which motion was thereupon argued by counsel for the respective parties hereto and was thereupon by the court overruled, to which ruling of the court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

Defendant's Case.

NILE SHAW, being first duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination:

I reside at Whitefish and am chief train dispatcher for the Great Northern Railway Company. I was train dispatcher for the Great Northern Railway Company on October 11, 1911, at Whitefish. I was the dispatcher that had charge of issuing orders controlling the operation of trains on the Marion Branch. The book which you hand me is the dispatcher's record of orders issued.

This particular page is in my own handwriting. Order No. 91 shown on this page concerned engine 563 and all extras on the Marion line. It concerned Mr. Hall's train. That order is transmitted by telephone; it governs the movements of all trains
88 addressed over a particular territory. I transmitted it to the operator at Kalispell; the operator at Kalispell then repeats it and then delivers it. While that order is in that shape, as I have transmitted it to the operator at Kalispell, no change can be made in that order except through me. This order would thus be the order defining the rights until revoked by me. This order No. 91 is addressed to Engine 563 and Extras west on the Marion Line at Kalispell; it says: "Engine 563 work eight P. M. October 10 until eight P. M., October 13, between Kalispell and Marion, not protecting against extras." The system of obtaining acknowledgement that that order had been received was that the operator at the delivery point would call the dispatcher and repeat the signature and the order number; the signature which he would repeat would be the signature of the conductor of the train receiving the order. That order was issued at 8:07 P. M., October 10, 1911. When the order is received by the conductor we write his signature as it is given to us on the margin of the order. That signature is shown here on the same line with the address, Engine 563. It says: H A Double L, Hall. 8:07 P. M. indicates the time when it was made complete to Mr. Hall. Under that order no one else would have any right on that track from Kalispell to Marion except trains authorized by the time table. No extra trains
89 could be operated on that line without first advising Mr. Hall in regard thereto. There would have to be another order put out. We would have to get hold of Mr. Hall, and give him and the extra concerned an order in order to get that extra out of Kalispell.

Thereupon the Order as so contained in said order book was offered and received in evidence without objection, and is above set forth.

That is the order under which Mr. Hall went out on that line at the time he was injured. Defendant's Exhibit 3 is Time Table No. 63 for Kalispell Division. That shows the trains on the Marion Line. The train is 375 and 376. That shows the time-carded trains operating there at the time Mr. Hall met this accident.

Thereupon the said exhibit was offered and received in evidence without objection and is by this reference made a part of this bill of exceptions.

Cross-examination:

I was trick dispatcher in 1911. I myself made out this message and sent it to Engine 563 and all extras on the Marion line. I spoke to the persons to whom it was addressed through the operator at Kalispell. I transmitted this order through the telephone to the operator at Kalispell, who in turn writes it on regular form

and delivers it in writing to the trains concerned. He, at
90 the time I dictate it to him, repeats it to me immediately and I verify it. If it is correct I tell him so, and if it isn't I tell him so, and correct him and make him issue new copy until he has it correct. When Conductor Hall comes in and signs for the order, the operator calls me up and gives me Mr. Hall's signature; and then I make it complete, giving the time it is completed. Hall does not get the order until I make it complete. He will read the order and sign it, and then he hands it back to the operator, and then the operator repeats the signature to me, but he has no right to deliver the order to anybody until I make it complete, and then it is ready for delivery. So, as the business was carried on there at that time, and if the routine was observed, Hall read that order and got it. The message was given to him so that he wouldn't be bothered about looking out for trains that they might send along there at any time. I gave him his authority to move in any direction on the Marion line between hours, and it is mentioned on the order. If an extra train was sent in there by me, the resposibility would rest on me and not on him in the event he didn't take any precautions. The Time Table shows what trains are operated there on the Marion Branch. I couldn't tell you whether there was a train run on the Branch on the tenth though; there is supposed to be; that is its date, I believe; Tuesdays and Fridays were its dates to run on, that is, its regular
91 schedule. I do not issue any orders for section men to run their section cars on the track and they sometimes run. There isn't any rule against their coming in at any time; they protect themselves. I don't recall whether around that time there was any extra gang doing ballast work on that line. If there had been a gang of men outside of the regular section men, and with an engine and some cars, that would be an extra; that would not be possible if this rule was carried out. I wouldn't send that kind of a train up there without advising Hall if he was in that territory; he wouldn't be there with that kind of an order if another extra was to be operated in there.

Redirect examination:

Before sending an extra train in there you would give the extra train a copy of that order. You wouldn't necessarily have to advise Conductor Hall. The extra train would have to stay in Kalispell if you did not advise Conductor Hall or flag out. You would, on the extra, have to look out for Mr. Hall; otherwise the extra would have to walk a man ahead of him with proper flagging materials, lanter-s, etc., and if at night he would have to have fusees, and so forth. He would have to look out for Mr. Hall. Mr. Hall wouldn't have to look out for him until he found him.

92 Cross-examination:

It is possible we would want to send another train up there. The message as it was given to Mr. Hall wasn't absolute assurance to

him that some train might not get on the track, but so far as he was concerned he was safe. But if another fellow would be sent up there he would have to take precautions to guard against Hall, or he would have a hard time going up. Yes, sir, if as a matter of fact he didn't take those precautions, and Hall did, Hall might be in a position to protect himself.

Redirect examination:

Flagmen are required to go far enough ahead to insure safety; the distance depends on the character of the country. The flagman would have to be far enough ahead to make sure he could stop his own train, or the one coming toward him; he would have to be half a mile or more ahead.

Recross-examination:

For the purpose of giving the signal the brakeman should go as far as necessary. As far as necessary will depend upon the speed with which the train is moving and the equipment that it has. That has something to do with it. Weather conditions and the contour of the country also have something to do with it. If there was a train with three or four cars equipped with air and
93 going at the rate of ten miles an hour, it wouldn't take half a mile to stop that train; you could stop it in a train length. Trains do not move very fast on that branch under my direction. Twenty miles an hour was the maximum if it was a freight train. A construction train would come under the classification of a freight train.

I never had any experience with the use of air. Sometimes in the case of moving trains, yes, sir, under our rules we are required to have lights. In the night time, whether a train is moving backward or the reverse, lights are used and required in the night time under the rules, yes, sir. It would be an infraction of the rules for a train to be on one of our tracks moving along without any light in front or in the rear.

Trains should not be backed up when it can be avoided.

THOMAS RAE, being first duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination:

My name is Thomas Rae. I am forty years of age. I am a brakeman. I have held that position for about six years. In October, 1911, I was a brakeman with Conductor J. B. Hall as my conductor, working on the Marion Branch. I remember the occasion of our coming into Kalispell the evening of October
94 11th, the night of the accident. At that time I don't think there were any cars on the east end of the switch at Kila. Immediately prior to coming in, yes, sir, I had a little talk with Mr. Hall relative to our movements and our duties and his, on our way to Kalispell. He told me to watch the air. He said he would

ride the platform and look out for stock. He said he would light a fusee. I think he lit two. I don't know who was present when these conversations took place. They took place just before we started to leave Kila, right at the caboose. Following this instruction to watch the air I rode in the cupola; I don't know whether there was anybody up in the cupola when I got up there; I guess we all went up there about the same time. I got up on the side opposite to the air. I don't know why I didn't get up on the side the air was on, but I guess the reason why I didn't was that there was somebody up there probably. McCauley was there and Fisher; McCauley was the brakeman; he is the Robert McCauley who was on the witness stand.

Q. What, if anything, did you say to him then, pursuant to this instruction that had been given you by the conductor?

Which question was objected to by the plaintiff as incompetent and hearsay, which said objection was by the Court sustained, to which ruling of the Court the defendant by its counsel then
95 and there duly excepted, which said exception was thereupon duly noted and allowed.

I have been in the court room during the progress of the trial; I have heard a description of the right of way, especially where that portion of the public road runs along beside the right of way near Batavia, one portion of it on each side of Batavia station

Q. What have you to say as to whether or not stock had been on the track in your different trips up and down the line?

Mr. Nolan: Unless the presence of the stock is brought home to Mr. Hall it is *im*competent. I don't know in regard to that; they haven't told us in regard to that. Of course, if their rules provide that there is a duty of conductors to be out on the platform watching for stock and also examining as to whether the track is fenced, then this evidence would be competent, but now, the simple fact that this man saw stock is absolutely immaterial unless there was something that transpired there that brought knowledge of the fact home to Hall.

Which objection was by the Court sustained, to which ruling of the court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

Mr. Veazey: We offer to prove by the witness now on the stand that they were looking out for cattle, that the witness was
96 looking out for cattle all the time they operated on the Marion line, and that cattle had been at this place on the day before and were seen by him, this place being the place where the accident occurred, and that cattle were seen also all along the line every day that they operated there.

Mr. Nolan: We object to that as absolutely immaterial. Why, as a matter of fact, the conductor might have been in that caboose preparing a report and have no knowledge of the fact at all.

Which said objection was by the court sustained, to which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Cross-examination:

I am still in the employ of the Company as a brakeman. Mr. Hall told me to look out for cattle, that is, he told me to watch the air and that he would go to look out for cattle. I don't know exactly when I first mentioned to anyone about that conversation. I suppose I made an affidavit in this case on the 19th of October, 1911. I don't know whether at that time I said anything about this talk with Hall. I don't know that there was anyone present at the time when Hall told me to do this. In the affidavit which you show me I did not say anything about this conversa-
97 tion. I don't recollect when it was that I first spoke about that conversation to anybody. I don't know as I ever told Mr. Noffsinger about it; I don't know whether I told him or not. I have not thought very much about the matter, no, sir, since then until I got on the stand. At the time he gave me this direction to go in the cupola and look out I don't know as there was anyone else there. We started from the neighborhood of Kila, yes, sir. I don't know where McCauley was at the time that Hall gave me this direction. Yes, sir, I did obey the direction, I was pretty close to the air. I was not the one who pulled the air. As regards the exact language that he used when he told me about getting into the cupola, he said to watch the air and he would look out for stock; he told me to watch the air, yes, sir, and that he would look out for stock, yes, sir. I think that is about all that he said. He might have said something about riding on the platform looking out for stock.

Q. That was something that you put in. Did he say that, or did he simply say "You look out for the air and I will look out for the stock"?

A. Yes.

Q. Without his saying at all that he intended to ride on the platform?

A. Well, he naturally would ride there. That is about the only place he could see the stock. When I was testifying I was
98 not telling what naturally was going to occur, but was telling you what he said. No, I do not think it is barely possible, in the light of the condition of my recollection, that he simply said he would look out for the track and observations on the track; I think it was stock he mentioned. Yes, sir, I am absolutely clear on that. No, he didn't say cows, I think it was stock; he said stock, yes, sir.

W. R. SMITH, being first duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination:

My name is William R. Smith; I am forty-six years of age; am Division Superintendent of the Great Northern at Everett, Washington, at the present time. I have been at Everett about four months. Previous to going to Everett I was Division Superintendent at Whitefish for about six years prior to going to Everett. Prior to

that time I was trainmaster and assistant superintendent. I refer to service in the Great Northern Railway Company. I have been in the employ of that Company since December, 1897. I started in as a brakeman, and have been a freight conductor, passenger conductor, trainmaster, assistant superintendent and superintendent. I am familiar with all of the Kalispell division, practically so, yes, sir.

99 The easterly boundary of the Kalispell division is at Cut Bank; the westerly is at Troy; branches extend to Michel in Canada, and include also the Flathead county branches, which take in the Somers Branch and the Marion branch. The class of country through which this division runs is known as the Rocky Mountain division of the Great Northern, as mountainous country. East of the mountains, east of Glacier Park, through the Indian Reservation it is a grazing country. Small portions of the division in other places is also grazing. A portion of the divison is fenced, but the greater portion of it is unfenced. I would say that on the entire division approximately seventy five miles are fenced. There are three hundred and ninety eight miles in that division. The greater portion of the fencing is done in Canada. There are forty-six miles of fencing there that was erected through an order of the Railway Commission of Canada last year; the remainder is scattered over the division at various places, a little here and a little there. The fences happened to be put up at the other places at the request of farmers owning the adjoining farms. When an application for fencing is made by a farmer, we require that, first, he must have fenced the other three sides. Yes, sir, I have had considerable experience in the train service. Yes, sir, there have been many cattle killed on this division by being struck by trains. I would say that

100 approximately two hundred head per year were killed by being struck by trains. Since I have been on the division we have had but one derailment in my recollection during my administration by reason of striking stock. I heard the testimony as to the way the train was handled on the night of the accident in question. I am familiar with the conditions at Kila. I am familiar with the engine, tender and caboose operated there.

There were two ways by which the engine might have been placed in front of the train at Kila; they might have run around their train; we will say, for example, that the engine is headed west and is west of the train, and they wish to get the engine on the east side of the train; to do that they would shove their cars in over the west switch and push the cars into the switch; they would then come out over the switch with the engine and then back easterly over the line to the east switch, and then run through the east switch down the siding and shove all the cars over the west switch, and pull back into the siding all the cars other than the cars composing their train; they would then go back through the switch to the east switch and out on to the line and then go west and get ahold of their cars composing their train again; and the cars are then on the west side of the engine and the engine is on the east side of the train without the

101 necessity of any running switch being made. The other way of doing that would be by making a running switch, called also a flying switch, a flip, drop, a high-diddy, or a dozen

different railway phrases for it; a running switch is the proper phrase. We will assume that the engine is on the west end and we want to get it on the east end of the train. With the locomotive attached to the cars you will start the train and this gives the cars a start; the engineer then shuts the throttle off, which leaves slack to pull the pin, the pin is then pulled and then the engineer opens the throttle and chases the engine down the track, leaving an opening between the engine and cars, and the switch is thrown between them after the engine has gone over the switch, and then the cars go into the siding, and then the engineer retraces his course on the line beyond the switch and then moves into the switch or siding and couples on to the other end. That is what is called a drop; it is made every day. If you assume that the east end of the switch at Kila was not filled with cars for a considerable distance, if there was ample distance to permit the two outfit cars and the caboose to run in there in the clear, a drop could have been made under those circumstances in two or three minutes. The only danger in connection with making a running switch in my experience has been with an inexperienced man throwing the switch at the wrong time. I can give you the approximate weight of the tender that was used on that train
102 without being loaded with coal and say with half a tank of water; it would weigh about forty thousand pounds; with ten or twelve tons of coal loaded into the tender you would increase its weight just that much. On that night in returning to Kalispell the train and engine crews should have run around their train and backed their engine into Kalispell in place of shoving their caboose and cars ahead of the engine; that is to say, instead of having the cars ahead of the tank with the engine headed west. What they should have done would have been to have backed the engine in at the east end of the train with the two outfit cars and the caboose coupled to the pilot of the engine, and the engine backing up. If they had done this they would simply have been following instructions from their train-master, instructions put out to the trainmasters through myself, coming down from the general manager, that trains musn't be backed. There is no bulletin to that effect. There are oral instructions given as to the handling and management of trains. These oral instructions cover conditions like those that existed that night. As regards what would be the liability of having a wreck from striking an animal in case the tender was in front, if the tender was constructed as this tender was, with a footboard, as testified to, as compared with the caboose ahead constructed as the caboose in question was, I would say that the extra
103 weight of the tank or tender of the engine above the weight of the caboose is in itself sufficient, together with the footboard, and it ought, to have moved any animal off the track without derailing the tank. Comparing the tank to the caboose, the caboose is simply a light constructed car and is used for the purpose only of handling the train crew and as a place for them to keep their signals and supplies, and to sleep and do their work. One of our standard cabooses will weigh, in the neighborhood of thirty-one or thirty-two thousand pounds, fully equipped with chains and other para-

phernalia, as called for by our standard rules, whereas some of our tanks will weigh over a hundred thousand pounds. The platform of a caboose extends out over the trucks and the stock would have a tendency to go under the wheel when the caboose is being backed. The platform would have a tendency to knock the stock down and it would go under the wheels and it might go to one side, depending on the condition of the animal when it was struck. If the tender, on the other hand, should strike the animal, the footboard would probably strike the animal first. The footboard is fastened on there with strips of iron six inches wide and an inch thick, bolted to the heavy end sill of the tank. It is of oak with a two-inch plank on the bottom for a step—It should carry almost any animal along. I don't mean to say that it would have
104 a tendency to throw it out into the clear, that would all depend on where the animal was hit. This step is about a twelve-inch plank. There is a plank at the back so that when the switchman steps on it, his foot won't slip off and go under. The distance from the bottom of the footboard to the top of he rail varies; it is probably three or four inches from the top of the rail to the footboard. We have eighty pound steel out there, and the height of a rail of that character is five inches, and five and three would be eight, and five and four would be nine, so the footboard would be from eight to nine inches above the ground. Yes, sir, the rails sometimes, but not always, cut into the ties. As regards whether the center of the track is a little higher than the foot of the rail, I would say that there is a little gravel there, but that might possibly be only an inch and it might be just level with the ties, it would all depend on whether there was any material there or not; we aim to have the track rounding so as to shed water, but it is not always so. As regards comparing the time it would take to stop an engine if the engine was backing easterly at the east end of the train compared with the engine backing at the west end of the train and shoving the train east back of it, it wouldn't make any difference which way they were going. If the air is coupled through from the engine to the caboose you can stop just as quick from the
105 rear of the train or the middle of the cars, it works automatically and instantaneously. While I was superintendent of the Kalispell division, as regards the service on the Marion branch other than the regular train service, I will say that during the winter the company usually put up from eight hundred to twelve hundred cars of ice, loading them at the Bitter Root Lake about a mile and a half of Marion. This ice is brought down to Kalispell and distributed at different ice houses from there. This is done usually in the latter part of February and the fore part of March, and that and picking up the ties that we buy from the farmers and ranches along the line is about the only work that is done in addition to the regular train, that is, the mixed train which hauls freight and passengers. As regards the time which is occupied each year in picking up ties on the Marion branch, it varies; some years the farmers get out more ties than others, but the time usually runs along three to six weeks approximately; that is about as close as I

could say; I could not give the exact time. I knew Hall in his lifetime; I couldn't say from memory positively whether he had ever worked on this Marion branch before, and I haven't the records with me to show whether he did or not. He came to me first at Whitefish I think during the month of March, 1909, and the
106 accident took place in October, 1911. He worked up and down the main line of the railway, yes, sir. He quite frequently ran trains along the main line from one end of the division to the other.

Q. Do you know whether he was acquainted with the condition of the railroad as to being an unfenced or a fenced railroad?

By Mr. Nolan: Just a minute,—Object to that as incompetent; the jury will say that.

By the Court: Objection sustained.

By Mr. Noffsinger: I think we will ask an exception. He might have made a statement.

By the Court: Well, if he ever had a conversation, that would be a different proposition.

Q. I will ask you, Mr. Smith, from your experience in railroading and as a conductor, freight conductor, working on a work train, whether or not he would know from his duties whether or not the line was fenced?

By Mr. Nolan: Object to that. That is the same thing, only a little less of it.

By the Court: Objection sustained.

To which ruling of the court defendant, by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. What would call to the attention of a conductor in the operation of his train, as in his duties, as to whether or not the line of a railway was a fenced or an unfenced line?
107 A. The observation of stock on the track, more or less, and the natural contour of the ground; more than that, and one that particularly will draw each and every engine man's and train man's attention to that, is "learning the road." A good train man, or an experienced man, you could take him practically anywhere in the middle of the night and he knows where he is, due to his observation of the topography and the contour of the road. That is especially so of us old timers that had to do a job of handbraking where we had to get out at a certain place in order to stop our train.

Q. Well, in the case of alarms for stock, or the stock whistle of the engineer, what is the duty of the conductor?

By Mr. Nolan: Just a moment. Are those duties prescribed? You have a book of rules that prescribes the duties of a conductor, haven't you?

A. We have. Yes, sir. But the duties are not all prescribed in that book; it would be too voluminous.

Mr. Nolan: Your line of railroad is operated so that most of the

duties performed by employees are simply prescribed by oral talks. Is that the way the Great Northern is run? Did you give those oral rules to Mr. Hall?

A. Mr. Hall would learn those the same as I did myself.

108 Mr. Nolan: No, no, I am asking you the question, 'Did you give them yourself?' That is a simple question. Those rules that you are testifying about, now, that are oral?

A. Well, may I ask what rules those are?

Mr. Nolan: Well, they say there is a rule there that he would look out and see the fence and probably from the fact that he was an old timer like yourself, having to do with the hand-brakes, he would necessarily have looked out anyway. But I am simply anxious to know. You say there was a rule of that kind. Did you yourself communicate these rules you are talking about to Mr. Hall?

By Mr. Veazey: What rules, if the Court please?

By Mr. Nolan: What is the witness testifying about? As to duties and obligations resting upon the conductor by reason of the fact he was instructed to do that.

By the Court: The objection is that that rule is contained in a book of rules. If so, the book of rules is the best evidence. The line of questioning now is to determine whether or not the rule would be contained in a book of rules, and, if not, if he is testifying to an oral rule, whether he communicated it to the deceased. If it is an oral rule, it will be necessary to show it is commu-

109 nicated.

By the Witness: If it please the Court, if I understand the question, it is merely asking what the duties of that conductor would be if they struck the stock.

By the Court: No, if a signal was given to show that there was stock on the track, what would be the duty of the conductor? Now, the objection was interposed to that, on the ground that the book of rules is the best evidence.

Witness: The book of rules will answer that question, if he kills the stock he makes a stock report.

By the Court: Sustain the objection.

Q. Well, would the book of rules cover the case, in case there was no stock struck?

A. No, except if there was any great amount of stock on the track, he might make a report to the section man.

Q. What I want to get at is what would be the duty, if any, of the conductor in the regular course of his business in operating a train, if a stock whistle was blown and the train stopped, as to getting out and ascertaining the cause?

Mr. Nolan: Is that duty prescribed by the rules, oral or written?

A. It is, sir, that one is prescribed by the rules, Colonel.

By the Court: The objection to the question is sustained.

110 Q. Can you find the rule here, speedily, Mr. Smith?

A. I will give it to you. "When a train stops under charge——"

By Mr. Nolan: Just a minute. I know you can give it to me, but I like to have the book. I am great on the books.

Q. In the regular course of business—I may be a little persistent in this, but I would like to make a record that will cover it—in the regular course of business, what does a conductor do in the operation of his train, especially with relation to when stock signals are sounded, or stops made on account of stock presumably on the track?

My Mr. Nolan: Just a minute. You have got a book of rules, haven't you? The duty of the conductor is prescribed under those circumstances by the book *or* rules, isn't it?

By Mr. Veazey: The question now asked is, not what is the duty of a conductor, but what does a conductor regularly do. What acts does he perform in the regular course of business? It might be a violation of the rules. What is the regular course of business?

By the Court: The objection is made that the book of rules is the best evidence, and the objection is sustained.

By Mr. Venzey: Note an exception on the ground that the witness is not asked "what is the rule?" but "what is the fact", as
11 to the act which conductors do perform.

We offer to prove that in the regular course of business, a conductor, on hearing a stock whistle blown, would perform the act of looking out and watching the stock on the right of way and observing whether or not they escaped from the right of way, and whether they had any means of escaping from the right of way, and whether there was any obstruction which would prevent them from escaping from the right of way.

By Mr. Nolan: If there is a book of rules here and this conduct is prescribed and it is in the regular course of business, this witness can't testify about it. The book of rules is the final abiter. If, however, as a matter of fact, there is some conduct in connection with the operation of trains, regular, and not against public policy, so that it may be a practice justified under the law, then oral evidence will be competent as to that if the book of rules was silent.

By the Court: If the rule is covered by the book of rules the objection is well taken; the book of rules is the best evidence. As I understand it, this witness stated that that matter was covered by the book of rules.

By the Witness: It is covered in the book of rules in such a way that possibly no one but an experienced man would understand it.

112 By Mr. Veazey: If the Court please, your Honor misunderstands. I don't desire to take any more time, but we are not asking now for rules, but simply for acts.

By Mr. Nolan: The objection is that those acts would be governed by the book of rules.

By the Court: The objection is sustained as to the offer.

To which ruling of the Court defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

(Witness continuing:) These ties were what is known as hewed

ties, which were brought in by the farmers or by log contractors and loaded up on the right of way. As regards the condition as to how these ties were piled up along the right of way, I would say that they are piled along the right of way between stations and at stations, and they are examined there by the purchasing agent and then we go along with a train, and what is known as a derrick, which will load about twenty at a time on a flat car. These ties are cut at different points on the Marion Branch between the intersection of the Somers Branch here and the end of the line a mile and a half west of Marion. The ties are cut back in the woods and hauled out along the side of the track on the right of way.

Q. In your opinion, as an expert railway man, I will ask you whether you consider it necessary to fence for the protection
113 of employees?

Which question was objected to as incompetent; it is for the jury to tell whether fencing is necessary for the protection of employees.

Which said objection was by the court sustained, to which ruling of the court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Mr. Smith, in your experience as a railroad man and having in mind your familiarity with stock being struck on the right of way, and, taking also into consideration the movement of trains on the Marion Branch, state whether or not it was necessary to fence at the point, or within a mile of the point, in either direction, where this accident occurred?

Which question was objected to on the ground previously stated in the objection to the preceding question.

Which objection was by the court sustained, to which ruling of the court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

(Witness continuing:) My previous testimony as to fencing and conditions on the line of railway of the Great Northern and Kalispell division applies to conditions on October 11, 1911, and prior thereto, as well as to the present time. On October 11, 1911, the rail-
114 way of the Great Northern Railway from Glacier Park west over the Kalispell Division on and before October 11, 1911, would be known as an unfenced railway; it was an unfenced line.

Cross-examination:

Yes, sir, some of it was fenced.

Q. How much of it would need to be fenced in order to be a fenced line?

A. As I understand the question, the matter of——

Q. Now, Mr. Smith, don't start to argue.

A. Practically all of it.

Q. Now, what do you mean by "practically"? that throws into the matter an element of doubt.

A. There is some of that Marion line fenced by the farmers, but

only one small portion by the railroad company, adjoining the land of Mr. Black just west of Kalispell.

Q. I am not talking about the Marion line. We were talking about the main line as being practically unfenced, an unfenced line. Now, I am asking how much fencing would have to be done in order to justify you in calling it a fenced line, and you say practically all of it. What do you mean when you say practically all of the line would have to be fenced?

115 A. Well, I will qualify my statement by saying that I don't think that we have at most approximately more than twenty miles of fence, outside the farmers' lines, on the entire division of 398 miles.

Q. Yes, and by reason of the absence of that fence, I understand you by reason of the absence of that fence you are in a situation to tell us under oath that your line is practically, in your jurisdiction under the Kalispell division, an unfenced line. Now then, I am trying to find out how much fencing would have to be done so that you would be in a situation to call it a fenced line.

A. Well, I really don't understand what you are trying to get from me. I have already said that there is only about approximately twenty miles of fence and the rest is unfenced; and you wouldn't call a line a fenced line unless it was all fenced, would you?

Q. So that if there was a strip of railroad, say two hundred miles long, and there was fencing all along except after you got about a hundred miles out where there were two rods of fence not out there, and then you go along about fifty miles and then there would be fencing for two rods, you would call that an unfenced line, would you, or would you call it a fenced line.

A. You wouldn't call it a continuous fenced line.

116 The best information that would come to a conductor as to the fenced or unfenced condition of the road would be when he would be "learning" the road. A conductor "learns" the road every day if he is twenty years on it; it is impossible for a man to learn the road in three or four days. Yes, sir, I told you that in connection with the fencing or not fencing on this line, of a track, that a man going over the road and "learning" the road would necessarily learn something about the fenced or unfenced condition of the road, and I still maintain that. Yes, sir, I meant by "learning" the road not that he is sent there especially, before he is assigned a run, but that he is learning it every day in and out that he serves. Naturally, the longer he is on the road the more conversant he is about those local conditions. Yes, sir, if a man were running for twenty years from Kalispell to Columbia Falls, he would be likely to know more about the road than a man who ran three weeks. That is naturally true, but I am not saying that he might not learn sufficient in one trip, but he would always still continue to learn, the more trips he made. That would be natural. The rules prescribed that the conductor will ride in the cupola, the look-out, when the train is in motion, or on the engine; he has there an opportunity to see. No, sir, the rules do not prescribe that he must stand on the

platform for the purpose of observing the country as he goes
117 along. No, sir, in the regular course of business he isn't required to do that. There are times, however, when it may be necessary for him to do so. For example, if he were on the back of that caboose and he wanted to examine the track, then such an exigency would arise. He might get an order from the superintendent to examine some portion of the track; he could see better from the platform, possibly.

During the two or three weeks, from the 25th day of September, 1911, to the 11th of October, I was on the Kalispell Division as Superintendent. I was not over this Marion Branch during that time. I was over that branch possibly five or six months before that. Yes, sir, when I testified about the ties there and how they were scattered along there, that testimony is absolutely the result of my personal observation as to tie conditions. Yes, sir, those ties that were picked up there on the 10th of October were there five or six months or more. They take them out in the winter time in the sleighing season and leave them until we are ready to pick them up. Ties may be brought in, yes, sir, from time to time; we accept ties from the farmers the year around. I have no memory from personal knowledge that Hall was ever over that road before he went there running this construction train. He was pos-
sibly up there several times, but I have no memory or actual
118 knowledge in regard to it. There would be an opportunity for him being up there without my knowledge. I haven't any recollection that he was sent up there at all.

Yes, sir, our records will show about two hundred stock cattle killed on the Kalispell Division every year, might be more some years, might be less some years. This track is fenced in places and in places it is not fenced on the Kalispell Division. The presence, or the lik-lihood of the presence of animals on the track would not have anything to do with the fencing of track from my standpoint, no, sir. If the putting up of the fence would save the killing of those cattle I wouldn't be concerned about that at all; I would rather pay for the cattle than put up the fence. As to the proposition that cattle on the track may derail trains, I have told you that I had one derailment recently out here at Hunt's Sour in my experience, where we had another derailment other than the derailment in which Conductor Hall was killed. The one derailment to whi*le* I refer is not one derailment in the course of killing two hundred cattle, but one derailment for the number of years that I was on that Division. We killed approximately two hundred a year, but there has been one derailment during my six years on the division. So that would mean that we had killed more than a thousand cattle before any derailment
resulted. In this country some railroads are fenced and some
119 are not. As regards whether the putting up of fences in connection with the shutting out of cattle had anything to do with the safe operation of the trains, I don't think it has. The reason why we put them up is, that when the farmer fences his three sides we then fence the other at his request. He makes the application. Down around Libby we have a portion of the line where there are

some ranches, and we have parts of the line fenced there; the ranchers requested it. As regards where fencing is done anywhere along the line of the Great Northern, it is done not having in mind at all the safety of the trains. The fencing is done simply for the purpose of keeping out cattle, or rather for the purpose of accom-odating the farmers who make the request of the railroad company to put up the fence, or for saving expenses in the number of cattle killed which we have to pay for.

I have never acted as Superintendent of any other railroad or as Superintendent of any railroad outside of Montana before I left the Kalispell Division and went to Washington. I have worked on other railroads; some of them fenced and some of them not fenced.

If your engine is headed West and is at the West end of your train with the caboose at the east end, and you desire to get the engine at the East end of the train, one way is by making a flying switch. The caboose would then be next to the engine when
120 the engine got to the east end of the train. Then you can throw the caboose out and take the two outfit cars between the engine and the caboose. You do that the same way. In backing that train, it wouldn't be good railroading to have the caboose next to the engine and the two cars behind. You would go through the operation which I have described by getting the engine around next to the caboose, then cut off the caboose from the cars, pick up the cars and then pick up the caboose with the engine at the east end of the train and the caboose at the west end of the train. The rules provide that employes must exercise care when their trains are backing up. Yes, sir, you can't avoid backing up a train. You can't operate, running a train only in one direction. The number of instances prescribed or the emergencies which exist when this backing up is to be done, is prescribed by the Book of Rules. Rule 483 and 483*a* says, "When a passenger train runs by a station or other stopping place the engineer must give the back-up signal and receive a signal from the rear end of the train before backing. Great care must be exercised in backing trains to avoid injuries to passengers or others by sudden and unexpected movement. No train, under any circumstances, must be backed up without the engineer first having
121 received a backup signal from a train man on the rear end of the same." That is the only rule that I have any recollection of at present prescribing the contingency or emergency when a backing up is permitted. There may be others. Rule 29 has application to an engine running backward and also the cars. When an engine is running backward without cars, or when cars are pushed ahead of the engine running backward, the markers and red lights must be displayed on the pilot beam of the engine and headlight covered, yes, sir. Yes, sir, there are instances when the cars are backed ahead of the engine. As to specifying the instances where that course of procedure is authorized, and whether the rules specify those instances, I will explain as follows: A conductor of a work train, for example, loading ties between here and La Salle, a distance of about seven miles, may get out two miles and a half, and his superior train coming along will drive him back to Kalispell: Under those

circumstances he must back. As to whether that is specified in the book of rules I would say yes, sir, that is a work train. A work train has the right to run in both directions. The train that Hall was using at the time in question was a work-train. A work train has the right to back up, yes, sir; with the cars in front of the engine, yes, sir, where absolutely necessary. He has got to. You can't get away from that proposition. As to whether the matter of time and
122 the matter of labor and the matter of accom-odation will be factors in determining whether or not that is to be done, the first and foremost rule in railroading is safety.

Mr. Veazey: Let us admit that there are times when you have got to back.

I don't think I could answer at all whether there is any fixed way by which you can determine when an accident will occur to the extent of derailing the train. As to whether, when the engine is running ahead with the pilot ahead, and the engine strikes a cow there is a possibility there would be a derailment, I can simply say that I have never seen one. I can only speak from experience, and say that I have never seen an enigen derailed from striking a cow with the pilot ahead. As to whether, in the case of a tender being ahead of the engine, and the engine backing up, with the tender in the rear, as to the possibility of a derailment occurring by collision with a cow under those circumstances, I have never seen one.

Q. But derailments occur and in the light of your experience as a railroad man, and having in mind the weight of the object as you told us, I am asking you, would it be possible, in the light of your experience, that a derailment could occur where the tender collides with a cow?

A. I don't think it would be possible. If it were possible, it wouldn't be probable.

123 Q. Well, how is it in the case of a caboose?

A. They are very light structure.

In the case of a caboose, in every instance where a collision takes place, there is likely to be a derailment, yes, sir. There is a possibility, yes, sir. It might be that there wouldn't be a derailment. Just all depends on how the animal was standing, at what point struck, and from what angle. I can't say how light the tender would have to be in order that there would be a possibility or a probability of a derailment. The construction of a tank or a tender is different from a caboose. In the light of my experience and with the knowledge that I possess as an expert, yes, sir, it might be possible but would not be probable. Those tanks are very heavy.

By Mr. Nolan: That is all.

By the Witness: May it please the Court, I could give you a little further information on that, and present proof as to eight oxen of the large size killed backing up without derailing the tank. Kill-

ing eight large oxen without ditching the tank. I can bring the proof for it.

Q. Well, was that under your personal observation?

A. No, sir, from my records, that is all. I can bring the proof, the witnesses.

Q. And on the Kalispell Division?

A. Yes, sir.

Q. The engine backing up?

A. Yes, sir.

124 Q. And going at what rate of speed?

A. I can't say that.

Q. What?

A. I couldn't say that now.

Q. What was the size of the engine?

A. Well, I couldn't say that. I couldn't say it myself, but I could bring proof of the fact to cover the report.

Q. Well, you hav-n't proof, now, to give us? Of course, you have different sized engines, haven't you, operating here?

A. Yes, sir, we have some large and some small.

Q. And on this Kalispell Division, across these mountains, you have engines that weigh how much?

A. Over five hundred thousand pounds.

Q. Including the tender?

A. Including the tender, and coal bin.

Q. You don't know whether it was one of those engines or not that collided with the oxen that you have in mind?

A. Yes. It was a much lighter engine than that.

Q. Well, if it were much lighter you have in mind some engine haven't you?

A. I have in mind the time and the year, and the class of engine we were running. We have just had three large engines the last year or two.

Q. When were these oxen killed?

A. That was several years ago when we were running the

125 thirteen hundred engines here. I wasn't aware of the circumstances until to-day.

Q. Until to-day?

A. Yes, but we have the proof, the actual men that seen the derailment are still on the division.

By Mr. Nolan: I move to strike out the statements of this witness with reference to that, on the ground that it is information that he threw in.

By the Court: All the statements of the witness as cross-examination starting with the testimony concerning the killing of eight head of stock, strike out.

By Mr. Veazey: Object to the testimony being stricken out on the ground that it was elicited by counsel for the plaintiff, and on finding that it was unsatisfactory, then for the first time, the motion was made to strike it out; and the motion to strike out the testimony is sustained by the Court after the testimony has all gone

in, and after counsel had previously waived any right to object to the testimony going in.

By the Court: As I understand it, there was no question before the Court, no question of the witness, and after counsel for the plaintiff had stated that that was all on cross-examination.

By Mr. Veazey: Counsel didn't ask to have it stricken out then, but proceeded with the examination.

126 By the Court: The examination continued until such time as it was shown to be hearsay evidence. The ruling will stand. Strike it out.

To which ruling of the court, the defendant, by its Counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

L. G. DUNNING, being first duly sworn as a witness on the part of the Defendant, testified as follows:

Direct examination:

My name is Leslie G. Dunning. I reside at Whitefish. I am Traveling Claim Agent for the Great Northern Railway Company. I have access to the records in regard to the number of animals killed in any year on the Kalispell Division. I have them in my office. I have compiled from those records the number of animals killed during the last three years.

Q. Will you state what those figures are?

By Mr. Nolan: We object to that as absolutely immaterial unless it is confined to this Marion Branch.

By Mr. Veazey: We are showing here that there nave been no derailments, in spite of the fact that on the main line they are operating innumerable trains, as shown by the time table.

Which objection was by the Court overruled.

127 Q. Will you state what that shows?

A. From January 1, 1911, to December 31, 1911, which would be a year, there were 329 animals killed, and from January 1, 1912, to December 31, 1912——

By Mr. Nolan: We object to that as immaterial. It is subsequent to this time of the accident in question.

Which objection was by the Court sustained.

Mr. Veazey: If the Court please, it is showing that there is no danger in the operation of trains from killing live stock.

To which ruling of the Court, the Defendant, by its counsel, duly excepted then and there, which said exception was thereupon duly noted and allowed.

Thereupon the defendant offered to prove by the witness on the stand that in the year 1912, on the Kalispell Division, there were 174 animals killed, but the Court refused to receive the proof and denied the offer of proof, to which ruling of the Court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

Thereupon the defendant offered to prove by the witness on the stand that in the year 1913, from January, 1913 to December 5, 1913, on the Kalispell Division, there were 145 animals killed, which offer of proof was by the Court denied and the Court declined to receive said proof, to which ruling of the Court the
128 defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

Witness continuing: I have statistics as to the number of animals killed on the Marion Branch from September 8, 1911, to the present date.

Q. How many animals have been killed in that period on the Marion Branch?

Mr. Nolan: We object to that except previous to October 11, 1911, and then only for the purpose of showing the likelihood of this man knowing about the existence of cattle on the track.

Which said objection was by the Court sustained and to which ruling of the Court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

The Court: I take it that the testimony as to the number of animals killed or being on the track on the Marion Branch prior to the date of the accident might be competent to show whether or not the Company was negligent in failing to erect a fence, and whether or not they knew of the conditions there, and for the purpose of showing whether or not the decedent who was in their employ knew the conditions there up to the time of the accident, but I don't see that the inquiry since the date of the acci-
129 dent would serve any good purpose in this suit.

By Mr. Veazy:

Q. From January 1, to October 11, 1911, how many animals were killed on the Marion Branch?

A. There were two killed up to October 11, 1911. That includes the animal killed in this instance, on October 11, 1911.

By Mr. Veazey: We offer to prove by the witness now on the stand the number of animals killed on the Marion Line or Branch from January 1, 1912, to January 1, 1913, and from January 1, 1913, to the present time.

By Mr. Nolan: We object to that as incompetent.

Which said objection was by the Court sustained, and to which ruling of the Court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: I take it that the ruling of the Court goes to the competency of the testimony and not to the manner in which it would be produced.

By the Court: The only objection is as to its competency and not to the manner in which it is produced.

Witness, continuing: I have my record here with me from January 1, 1911, that is the record now in use, yes, sir.

130 (Witness excused.)

E. M. CAMPBELL, Being first duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination:

I live at Whitefish, I am a freight conductor in the service of the Great Northern Railway Company, and have been for a little over four years. On October 10th, 11th and 12th, 1911, I was a Freight Conductor in the service of the Great Northern Railway Company. On October 12th I was sent to Kalispell to take the work train that Mr. Hall formerly had. I went to Kila first on the 13th of October, that was Thursday or Friday, I think it was Friday. I arrived at Kila about 7:30 or 8:00 o'clock in the morning; at that time I made an examination of the side track and the cars there. I made a list of the cars there by taking the outfit cars that was to be used in the operation of the work train and also the number of empties and the tie loader, and the number of cars that were on the passing track. The first day I came into Kalispell the gang was just organized, and we didn't do any tie loading that day. The crew, or most of the crew, were held for an inquest, and in the afternoon we took Mr. Tenner and yourself out on the work train to Batavia. That is all the work we did on the 12th, we never arrived at Kila on the 12th. On the 12th we went out and
131 picked up the equipment at the point of the wreck, picked up the caboose. The morning of the thirteenth we left here with the work train equipment to go to Kila and gathered the gang and the rest of it, and started to pick up ties west of Kila. At the time I arrived at Kila, as regards the conditions there then on the morning of the 13th, as to cars on the sidetrack or passing track, at Kila, I will state that there were cars on the west end of the passing track; at the extreme west end there was a car of coal, company coal for use in coaling the engine; and just east of that was a revenue car, an empty belonging to some other road—didn't belong to my outfit, and I just noted it; and east of that was the outfit cars and the ties that had been loaded previous to the time of my going out there. In the whole number there were nineteen cars about. Thre must have been at least fifteen car lengths at the end of the switch. A car length is supposed to be forty-two feet. That is the passing track basis. A car is forty-two feet in length. The cars in there were not forty-two foot cars, the outfit cars are only about thirty-three foot—twenty-eight and thirty-three feet. That siding had a capacity of about forty or fifty cars. The time card shows the capacity.

Thereupon the defendant offered in evidence that portion of the time card showing the capacity of the passing track at Kila,
132 but the plaintiff objected to the introduction of the same in evidence for the reason that the same is hearsay evidence;

which said objection was by the court sustained, to which ruling of the court the defendant by counsel then and there duly excepted which said exception was thereupon duly noted and allowed.

(Witness, continuing:) A blocked passing track is a passing track with one or more cars on it. A blocked passing track does not necessarily have to be full to be blocked. One or more cars will block a passing track. That is the meaning attributed to it in railway parlance.

Cross-examination:

I came up here the 12th and went up to Kila on the 13th. Mr. Noffsinger was not with me on the 13th, he was with me on the 12th. I did not go to Kila on the 12th. On the 12th I went up as far as the accident, just west of Batavia. He was not with me when I went to Kila. I was not directed to ascertain the number of cars on the siding at Kila. I came to do that because it is my business to do so. It is my business to take the number of cars that I will use in work train service, yes, sir. I said there was about nineteen cars there. I checked the numbers of cars I was to use, and then looked over the rest of them; the only car I didn't mention was this car of coal and this empty box car. East
133 of the car of coal was an empty box car. The outfit cars were about nineteen cars east of the coal. I said there were about nineteen cars altogether; I wouldn't want to make an oath that my count was correct, I might be mistaken there to the extent of one car, more or less. No, sir, I would not be likely to make a mistake of two; I did not measure the length of the siding. Yes, sir, I said that there was space at the eastern portion of the siding to accommodate about fifteen cars. It is the duty of a conductor on a work train to observe the conditions with which he has got to work, and that is what I did. On the 13th I took out about four empties and the tie loader from there.

(Witness excused.)

I. B. STEVENS, Being first duly sworn on the part of the defendant, testified as follows:

Direct examination:

I have been sworn before. I am familiar with the stretch of road shown on plaintiff's exhibit 1 near the road paralleling the track. When we commenced loading ties on the Marion Branch, we loaded ties on that particular strip of ground between those points, yes, sir. We first commenced loading at the Batavia School house. The Batavia School house is right pretty close to the west switch at Batavia. We also loaded some ties about two miles, or two
134 miles and a half from Kalispell on this Marion Branch. That was before we came along by the side of this public road. As to whether we loaded any ties at the western extremity of this strip of ground along here where the public road parallels the track, we

loaded ties right at the road crossing. In loading the ties we had a kind of hoisting machine that raised a number of *cars* up on a flat car. This hoisting machine would not attempt to load more than one car at a time. The lever wasn't long enough, no, sir, to reach back and load a second car; so when we got one car loaded we would take that to a siding. When we were loading at this road crossing about a mile and a quarter west of Batavia, as to which I have testified, the nearest siding would be Batavia, and we would take the car to the nearest siding. When we loaded a car, the crew would take it down and put it on the side track—the train crew. The train crew were composed of Conductor Hall and Robert McCauley, and Tom Rae. George Stevens and myself were the engine crew. I think we loaded two or three cars there and we would run back and forth and put them on the siding, yes, sir. During this time there were cattle grazing along on the public road and the highway, I would see them at times. Conductor Hall made those trips back and forth with me, yes, sir. This work was done in the day time, yes, sir. As
135 regards whether in proceeding to our work from Kalispell, at any time, we were compelled to stop our train by reason of stock getting on the track within the limits of this approximately two miles of country where the public road runs along the right of way, I will say that there is just once that I remember of. The whistle was blown at that time; the stock at that time had to be driven off. That occurred right up there where the County road runs along the track. I couldn't say how far it would be east or west of Batavia Station, it was right along there, right near Batavia. Conductor Hall was on the train that morning when we started out, he was in the caboose; I think he was on the train when we blew the whistle for the stock, of course I didn't look back to see whether he was or not. The stock whistle was a steam whistle on the engine; there is a special whistle for stock, the stock whistle was blown; the stock whistle is a succession of short blasts to the whistle, that is the whistle known to the train crew as the stock whistle. Yes, sir, I think that whistle was blown in making different trips between Kalispell and Kila.

After the accident on the night of the 11th, we fetched the train to Kalispell or rather the two outfit cars; that was done the next day; we were held for an inquest. When we went back Campbell was our conductor. Before Mr. Campbell went back as conductor
136 the train did not make any trips there, since the date of the accident.

Cross-examination:

On the 10th we were working west of Kila; on the 9th we were working west of Kila; I think on the 8th we were working between Kila and Batavia; I am not sure where we were working on the 7th. On the 7th if I remember right, we were working about two miles and a half out of here, Kalispell. On the morning of the 11th, we was right at Kila siding loading number two ties. On the night of the 10th, we stopped at Kila; on the night of the 9th I am not sure, but

I think we stopped at Kila, I am not sure of it. On the night of the 8th, we stopped at Kalispell. We were working right at the siding at Kila on the morning of the 11th. When we started to work on the morning of the 11th, we worked on the main line. I could not say how many cars we had to be loaded. I think it was around the eighth that we went down to Batavia siding. The time it would require to load one of those cars varied, it would take two or three hours, or an hour or two, according to how many ties we put on. I was there, yes, sir, and saw what was being done. After the car was loaded we would then put in into the siding, we would generally put it in at the west end of the siding. As to how far from the west side of the siding we were when we would start to put the car in,
137 that would depend upon where we were loading. We were loading right there by the west switch; we started loading on the morning of the 11th, right there near the west switch, then when we loaded the car we went ahead and shoved the car in. The engine was headed west. On the night of the 7th and 8th we were at Kalispell, here. I couldn't say for sure what time in the morning we started out from Kalispell on the eighth, I think it was somewhere around between five and six o'clock, probably. I do not know how many cars were in the outfit when we started out. I think we started in to load on the morning of the eighth up around Batavia. I ain't sure of that. This was at different distances, wherever it was from the siding. We started out right near the west switch, right near the west end of the Batavia switch. I couldn't say for sure how many cars we put into that switch that day. These cattle that I say we encountered were encountered in the middle of the day—at all hours of the day. I don't know by whom the cattle were driven off the track, they were on the track at the time. Yes, sir, when a car was loaded it was taken out of the outfit and run down and put in to the siding. The loader was next to the engine and we loaded the car next to the tie loader and the car was put in to the siding generally from the west end. Yes, sir, there would be a cutting out of
138 the car that was loaded. We didn't drop them into the switch, we shoved them in. I couldn't say how many of the crew went along for that purpose, I couldn't say whether the whole crew went along or not. Sometimes the brakeman would do the work of taking the car out of the outfit and putting it into the switch. I couldn't say what the conductor was doing when he went along. As regards how many cars we loaded on the eighth, throughout the entire day, I couldn't say as I didn't keep any track. As to whether we came east of where we started out in the morning, or whether we went west of where we started out, I am not sure whether we came east or not. I remember being down in Mr. Logan's office the other night, with Mr. McCauley and Mr. Chester. No, sir, I don't remember about your asking me about Mr. Hall knowing of any cattle on the track, or seeing any cattle on the track at any time; you might have asked me that. Yes, sir, I remember saying at that time that I myself, at one time in the movement of the train, encountered cattle out there. I don't know that I said at that time that that was the only time that I had any knowledge of any cattle being on the

track, and that I was busy firing the engine. I couldn't tell whether Hall saw those cattle or not. Hall was along with the train there where there were cattle on the track. He was generally around
139 on the job—on the work. I could not say whether he was with this car that was thrown into this switch at the time that these cattle were on the track. I said he was generally along with the train. I don't know when this car was taken along and when these cattle were encountered whether Hall was then along with the car, he was generally along with the train. I didn't keep track of him, where he was. I didn't say for sure, that as a matter of fact the only knowledge that I had of cattle out there was the time referred to when the train was in motion. I said I thought so. I am not sure that I stated at that time that that was the only time that I saw cattle, this time when the train was in motion, and not when these cars were put into the switch. I have not been speaking with anyone as I know, about cattle out there recently. I didn't speak to anybody as regards to cattle, no, sir. I didn't speak to Mr. Noffsinger about it, no, sir. As regards whether Mr. Hall was along at the time when these cattle were encountered and when these cars were being put into the siding, I ain't sure whether he was along or not, no, sir.

Redirect examination:

As to whether at the time we encountered the cattle and stopped, it was one of these times when he was switching these loaded cars back and forth, or when we were going out with a full train, I think
140 it was when we were going out. When we were loading a car, we had the engine and a flat car that had the hoisting machine on it next to the engine, and next to that was the car that we were loading. The caboose would be on the east end of the train. We would probably have more flat cars that we were loading; the caboose would be at the east end of the train. We would have the engine and next to the engine would be the flat car with the tie loader, and then would be the car that we were loading, and the rest of the train when we went out to load ties, we took with us. Then when we went back to the switch we would run by the switch and cut off. We handled the hole train, yes, sir, back and forth.

Recross-examination:

Yes, sir, we would take the whole train down to the siding and shove the hind end down over the switch, and cut off and shove the loaded car in on the siding.

Redirect examination:

Soon after the accident I was examined by Mr. W. R. Smith and made a statement, that there which you show me, set forth my signature. That statement signed by me was taken down shortly after the accident, I don't know just when, I think it was taken down before a stenographer.

Q. I will ask you if this question wasn't asked you by Mr.
141 Smith: "Had you seen any cattle along that track previous to this time?"

Which question was objected to by the plaintiff on the ground that the same was incompetent which objection was by the court sustained, to which ruling of the court the defendant by counsel then and there duly excepted which said exception was thereupon duly noted and allowed.

G. L. STEVENS, Being first duly sworn as a witness on the part of the defendant, testified as follows:

Direct examination:

I have been sworn before. During the time that we were working on the Marion Branch, when Mr. Hall, the deceased, was conductor, I remember going out to work along this two mile strip of right of way, where the public road runs along by the side of the right of way near Batavia Siding, and I remember of stock being on the track. As regards what was done at that time by me in the movement of the train, we either stopped or slowed up almost to a stop, when the stock got off, or one of the men in the train crew went and drove them off. I don't remember whether we came to a stop before they got off, or they got off before we stopped. Anyway, there was a bunch of horses—probably six or seven. The whistle was blown;
we blew the stock whistle, which consists of short blasts. Stock
142 whistle consists of short blasts of the whistle; you blow a number of times—possibly blow for a second each time. Short, quick, blasts, one following the other rapidly, yes, sir. At that time we had the caboose and two outfit cars and some empties, I think, and were going up to work. Conductor Hall was with us. This was about a mile east of Batavia Siding, it was about two miles east of where the accident happened.

Cross-examination:

It was west of the public highway, possibly a quarter of a mile west of the public highway. Referring to Plaintiff's exhibit one, it would be here, (Indicating the public road). The point where we encountered the stock was about a quarter of a mile west. The mile board at Batavia is right about at this road crossing. That is about a mile east of Batavia—that road crossing, and we encountered the cattle about three-quarters of a mile east of that, that would be about a quarter of a mile from this public highway. I don't remember the day. Yes, sir, there were six or seven horses. That east crossing is about two miles from where the accident happened. I encountered these horses about two miles east of where the accident happened, not two miles east of Batavia. It is just about two miles from where
the accident happened to where this public road crosses, it
143 might be a little over that, the mile board is just west of the crossing a little ways. I didn't get out and measure it. This occurred in the morning. That is the only time that we encountered

horses that I know of. I saw cattle up there frequently. In this instance I don't remember whether we stopped the train or not. As to how I remember that we whistled then, I will say that this is because I remember seeing the stock there, and we slowed up. I remember that. If we stopped, somebody went up to drive the horses off. I am pretty sure that they got off about the time that we stopped. As to how slow we got to, I will say that we slowed down to possibly two or three miles an hour, if we didn't stop. No, sir, I don't remember whether we actually stopped, but I do remember, yes, sir, that we slowed down to about two miles, and I have a distinct recollection about our whistling. We continued whistling for possibly a couple of minutes, or three—until they got out of the way, or else got up the track quite a ways ahead of us. I remember about stopping whistling. We stopped whistling when they got off the track. As to whether my testimony with reference to that, it not because I recollect about the incident, but because that would be the customary thing for me to do under those circumstances, I will say that I remember that that is what happened, that is what I did do.

144 I do not know how many cars I had at that time. Mr. Hall was probably in the caboose at that time; he was there when we left. Yes, sir, he might have been the fellow that went and drove the horses off, I didn't see anyone—don't remember seeing anyone. Yes, sir, you talked with me in Mr. Child's office and asked me about these cattle, yes, sir. I don't know whether Mr. Hall saw the cattle or not, we slowed up several times for cattle up there. No, sir, I did not make a statement to you in that conversation that I had with you there, that there was one time that I had in mind about cattle being on the track and about slowing up in order to get by. No, sir, I did not make such a statement in the presence of Mrs. Hall that I know of. I don't think that I made such a statement.

(Witness excused.)

W. R. SMITH, Being recalled for further cross examination, testified as follows:

Cross-examination:

No, sir, I have not said that I never knew of an instance where an animal, a cow, derailed a train, where the engine with the pilot on struck the animal. I stated in my experience we had one out here at Hunt's Spur; that was about four years ago. That was a passenger train, yes, sir, and that is the only one that I have in mind, yes, sir.

145 Redirect examination:

On that occasion it simply derailed the engine and went down the bank. It was right on the fill, nobody was injured. They collided with a bunch of stock, that was the report from my assistant.

Recross-examination:

No, sir, I didn't see them. No, sir, it is not true to my knowledge that there were a couple of passengers injured at that time, or that

claims were presented. I have no recollection of anyone being injured in that derailment at all. I did not go to the wreck before it was all put back and the engine was back on the track; I left that to my subordinates.

(Defendant rests.)

Rebuttal.

W. R. SMITH, Being first duly sworn as a witness on the part of the plaintiff on rebuttal, testified as follows:

Direct examination:

In connection with the work that was done by Mr. Hall on that work train, he was required to keep a conductor's book. In the ordinary course of his business, and he would make entries in that book about the cars and about the place where he was each day.

146 Referring to this book, all that I can say is, that it looks like conductor J. P. Hall's handwriting. It might have been the time-keeper's, I remember we got mixed on that once before today, but I would think that is conductor Hall's writing. It was a book that he was required to keep under the rules of the company, yes, sir, and to make those entries as they were made there, whether they were made by himself or somebody else, yes, sir. And when he got through with this book he should have turned it in. I was not present when the book was made out, no, sir. I am not saying that he made this book out at all. This book looks very much like his writing, I have seen him write. I would say yes, sir, that in my judgment that was his writing, and that book was a book kept by him under the rules of the company, but I couldn't swear this was his writing. I would say it looks like it. It is a good many years since I have seen the man's writing.

Q. Now, will you refer to the book as to the entries on October 10?

Which question was objected to by the defendant on the ground that it was hearsay, and that it was not shown that these entries were in the handwriting of Mr. Hall, and on the contrary they may be the handwriting of some other person, to-wit: the time-keeper. Which objection was by the court over ruled to which ruling of the court the defendant by counsel then and there duly excepted.

147 (Witness continuing:) From the note sin this book he was loading ties between Kalispell and Athens on October, 10th, and this book says that he started out on the morning of the 10th, leaving 1232—and I couldn't say what that station number is, without referring to the book. The book shows that that station number is Kila. This shows, yes, sir, that he left Kila in the morning. The book shows that he stopped on the night of the 10th, at 1132, Kila. Yes, sir, according to the book he left Kila in the morning and got back to Kila in the evening. You notice further

down some of those cars were left at station 1222, which is Kalispell, proper; whether or not he has been to Kalispell and back during that time, I could not tell by this book. He may, or may not have been. He simply shows that he started and tied up.

Cross-examination:

As to whether every night that this book shows that cars were left at station 1222, that would indicate that Hall had been in Kalispell, I will answer it might or it might not. You couldn't tell by the book. That was the final destination as far as conductor Hall was concerned.

(Witness excused.)

CASSANDRA HALL, being first duly sworn as a witness on the part of the plaintiff, testified as follows in rebuttal:

148 Direct examination:

Yes, sir, I was present the other night in the office of Messrs Logan and Childs, when I had a conversation with Mr. Stevens, the fireman. I don't know whether Mr. McCauley and Mr. Chester were there. I think a Mr. Fisher was there, I think that was his name.

Q. I will get you to state, whether or not at that time in the conversation that I carried on with him, Mr. Stevens didn't make this statement? That the only time during the time that they were on this branch up there that he saw cattle was once, and that at that time he didn't know whether Mr. Hall saw the cattle or not?

Which question was objected to by the defendant on the ground that the *in*dentical question was not put in form or substance to the witness I. B. Stevens, and on the ground that the plaintiff did not call the attention of the witness I. B. Stevens to the persons said to have been present and to the time.

Which objection was by the court overruled, to which ruling of the court the defendant by counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

A. Mr. Stevens said just about that.

Mr. Noffsinger: We move to strike out the answer as not responsi*ble*.

Which motion was by the court overruled, to which ruling of the court the defendant by counsel then and there duly ex-
149 cepted which said exception was thereupon duly noted and allowed.

Cross-examination:

Yes, sir, I have found the employees of the railway company, after this accident, at all times quite friendly. I received my husband's train book at the hands of the witness, Rae. I believe it was Mr. Rae. I don't know who packed his things.

(Plaintiff rests.)

The foregoing is all the evidence introduced upon the trial of the above entitled cause, and the foregoing set forth all of the testimony adduced at the trial of the above entitled cause.

Thereupon, the defendant moved the court for a judgment of dismissal upon the merit, upon the testimony aforesaid and at the conclusion of the testimony aforesaid and when all the evidence and testimony aforesaid had been taken, as follows:

Comes now the defendant in the above entitled cause and at the close of all of the evidence in the case and when all the testimony in the case had been adduced, and moves the Court for a judgment of dismissal upon the merits upon the testimony aforesaid, upon the following grounds:

First. That the testimony adduced in the case does not constitute facts sufficient to constitute a cause of action.

150 Second. That the testimony adduced in the case does not show the violation by defendant of any legal duty owing to plaintiff's intestate.

Third. It appears from the complaint that this action is based upon the federal statute defining the liability of railroads for injuries to, or deaths of employees by reason of negligence, and the question as to the meaning of "negligence" under this statute, and as used in this statute, is necessarily a federal question; that the sole ground of negligence charged is a failure to fence the railroad track in question, and this question, therefore, as to whether any duty was owing to plaintiff's intestate to fence the track under the case as made in the complaint, must be determined as a matter of federal law aside from any statute of the State of Montana; and under all the federal decisions, and under the federal law there is no duty owing to an employee to fence the track; and hence, there being no federal or other duty, there can be no liability under the federal statute, or in the case as framed by the pleadings. As regards the Montana, so-called, fence statutes, they did not impose an absolute duty to fence, and by their terms, and by their restrictions, contained in the titles to the legislative acts of Montana, the duty to fence is not one which inures to the benefit of employees, or for a violation of which a cause of action can arise in favor of an employee, or his administrator, to recover dam-

151 ages by reason of his injuries or death; and such statutes, moreover, can have no bearing in an action brought under said Federal law.

Fourth. It appears from the complaint that the sole ground of negligence charged is a failure to fence the railroad track in question. By the Common Law, there was no duty resting upon defendant in favor of plaintiff's intestate to fence its track; and under the statutes of Montana, the original code did not create any duty to fence, but merely provided what fences should be erected by railroad companies if they did fence and left the option with the adjoining farm owners to determine whether there should be a fence, and did not embody any obligation except in the case of adjoining farm owners, only, who owned farms immediately adjoining the railroad track; and subsequent amendments by legis-

lative enactment, by reason of the titles of such acts being limited to liability for stock killed, cannot create a duty to an employee or liability for the death of plaintiff's intestate, the title to such acts being insufficient to cover the case of damage to persons, or any damage or liability other than damage to or liability for stock, hence, as there is no legal duty owing to plaintiff's intestate, there cannot, in any event, be any negligence.

Fifth. There is a fatal variance amounting to a failure of proof between the allegations of plaintiff's complaint, and the
152 proof, which variance amounts also to a failure of proof, in that it appears from the complaint that this action is based upon the statute of the United States defining liability of railroads, while engaged in inter-state commerce, to its employees, or their families while such employees are employed in such commerce; and it is alleged in the complaint that at the time plaintiff's intestate was killed, defendant was engaged in inter-state commerce, and that he was employed by defendant in such commerce; but the proof adduced in the case does not show or tend to show these allegations to be true; and, on the contrary, shows that according to the proof, the defendant was not at the time engaged in inter-state commerce; that plaintiff's intestate, also, was not employed in such commerce, but that at said time defendant was engaged only in intra-state commerce, if in any commerce, and that plaintiff's intestate was employed, if in any commerce, only in intra-state commerce. The proof shows that the only work being done by the deceased was the loading of ties left on the right of way by contractors who had cut the same in the neighboring hills, and that these ties, as raw material, were to be sent to the tie-treating plant at Somers, where raw material was to be treated and manufactured into the finished product or tie, which finished product might or might not thereafter be used in commerce, interstate or
153 otherwise, by defendant or anyone else, and especially that the same might be used only in the construction of new lines not owned or operated by defendant, and in fact not in operation, but owned or being constructed by different companies other than the defendant. The work done by plaintiff's intestate was not in any way connected with any commerce, but was at most preparatory to, or anterior to commerce later to be undertaken. The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the federal court whereas, if the cause made by the proof had been alleged, to-wit, an intrastate case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the federal court, and a refusal to recognize such a variance permits the plaintiff to allege a cause of action under the laws of one sovereignty, to-wit, the United States, and to maintain or seek to prove a cause of action under the laws of another sovereignty, to-wit, the State of Montana.

Sixth. It appears from the uncontradicted evidence in the case

that even if the defendant was, under the Court's ruling, in
154 any respect negligent in any of the matters complained of in the complaint, or in the matter of not fencing the track, this condition of the track, and the dangers, if any, incident thereto, should have been known to the plaintiff's intestate, and in fact actually were known to him; and upon the further ground that at the time he was injured he was backing his train, whereas, if he had, in accordance with proper railroad operation, according to the testimony, placed the engine at the head of his train, as the train moved toward Kalispell, the accident would have been avoided, and that he had, according to the testimony, a safe way of proceeding to-wit, by placing his engine at the east end of his train; and that therefore he assumed the risk of the conditions of which complaint is made in regard to the matter of fences, and in regard to the danger to be encountered from striking animals, and because of his choice of a dangerous, or at least more dangerous method of proceeding; it appears from the uncontradicted testimony that the work done by Mr. Hall lasted for at least some five days, from October 7th to October 11th, and that all the work which he did was done in broad day light, and that in doing this work he was not simply running over the line from time to time, but most of the time his train was standing still, and it would be impossible under these circumstances and under other circumstances discovered by the evidence for him not to
155 have observed the lack of fencing and the dangers, if any, which confronted him. And moreover the testimony is uncontradicted that this entire line west of Glacier Park Station is practically unfenced, and that he did much work for many years up on the main line, so that beyond question he knew of the unfenced condition of the line and therefore assumed the risk.

This motion is based upon the complaint of the plaintiff and the records and files in this cause, and upon all of the testimony in the case.

Which said motion was by the court denied and over ruled, to which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Be it further remembered that, thereupon, at the conclusion of the evidence in this case, and when the taking of all the evidence therein was completed and said motion for judgment of dismissal was overruled, the defendant Great Northern Railway Company presented and delivered to the Court its written requests for instructions, signed by defendant's attorneys, and numbered 1A, 1B, 1C, 9 and 13, and likewise the Court presented to counsel for the respective parties its certain proposed instructions, which were thereafter given as hereinafter related, and likewise the plaintiff presented and delivered to the Court his written requests for instructions, signed by the
156 plaintiff's attorneys and numbered consecutively, among which said instructions requested by the defendant or requested by the plaintiff are the requested instructions hereinafter set forth.

Thereupon, and in the absence of the jury, the said requested and proposed instructions were examined and argued before the Court, and the instructions given by the Court to the jury were settled by the Court, at which settlement of instructions the objections and exceptions of said defendant Great Northern Railway Company, then and there made, were then and there taken down by the Court Stenographer and, as so made and taken down, are hereby presented to the said defendant and are hereinafter set forth.

Thereupon the Court gave to the jury its instructions in writing, as so settled, and none other, which said instructions given by the Court are in words and figures as follows, to-wit:

GENTLEMEN OF THE JURY:

1. Plaintiff, in his complaint, alleges that on the 11th day of October, 1911, and for a long time prior thereto, one John P. Hall was employed by the defendant Railway Company as a conductor on one of its trains, and that at the time that he received the injuries which resulted in his death, he, the said Hall and the de-
157 fendant railway company were engaged in inter-state commerce. It is alleged that on the 11th day of October, 1911, and for a long time prior thereto, the defendant company negligently and carelessly allowed and permitted its right-of-way, track and property, to be and remain unfenced at and near the place where the said Hall was killed, so that cattle could enter upon the right-of-way, track, and property, and being so on said right-of-way, track, and property, were likely to cause the derailment of trains through collision; and that defendant company negligently permitted trains to run over its tracks while its right-of-way, tracks, and property, were unfenced. It is alleged that on the date mentioned, to-wit, the 11th day of October, 1911, the said John P. Hall was assigned to duty on one of defendant's trains engaged in inter-state commerce running between Marion and Kalispell over the track negligently left unfenced; and while the train was being backed up, with the caboose in front, from Kila to Kalispell, between the hours of seven and nine-thirty, P. M., the train collided with a cow which got on the track by reason of the right-of-way not being fenced, and that, as the result of the collision, the caboose in which Mr. Hall was riding was derailed and Mr. Hall was thrown on the track and run over by the train, receiving injuries from which he died; and that, by reason of his death, damages have been sustained to the amount of fifty thousand dollars.

158 All of these allegations are denied in the answer filed by the defendant railway company, except that it admits that Mr. Hall was in the employ of the company as conductor, and that at the time stated in the complaint he was a conductor on one of defendant's trains running between Marion and Kalispell over a track owned and operated by the defendant company; and that while said train was being backed with the caboose in front thereof from Kila to Kalispell at about eight o'clock, P. M., the train collided with a cow which had gone upon the track, and that, as a result of the collision, the caboose was derailed, and that thereafter the train

passed over his body inflicting injuries from which he immediately died. In the complaint it is likewise alleged that Mr. Hall at the time of his death was forty-two years old, and was capable of earning one hundred and eighty dollars a month. In the answer, this is denied; but it is alleged in that connection that Mr. Hall was over fifty years of age, and was capable of earning and was earning not to exceed one hundred forty dollars a month.

In the answer it is also alleged that Mr. Hall's death in the manner in which it occurred was due to his own fault in backing the train as it was backed and in being on the platform of the caboose at the time that the derailment occurred. It is also alleged that the
159 injuries which he received in the manner that thty were received, resulting in his death, were incident to a risk which he assumed in continuing his employment with the company, knowing as he did that cows were likely to be upon the track, and that he knew, or in the exercise of reasonable diligence might have known, that the track and right-of-way were unfenced, and that the risk incident to running the train over the track in question by reason of cattle being on the track and by reason of its unfenced condition was a risk that he assumed by virtue of his employment, and was a risk for which the company could, in no manner, be held responsible. In other words, in the answer under consideration, the company sets up the fact that the injuries to Mr. Hall were due to contributing fault, and carelessness on his part, and that likewise Mr. Hall assumed the risk of being injured as he was. The plaintiff, in the reply, denies that Mr. Hall was guilty of contributory negligence, and likewise denies that he assumed the risk of being injured as he was.

2. You will notice that the negligent act charged in this instance is the failure of the railway company to fence its track so that cattle might be prevented from going upon the track.

3. This action, as framed in the complaint of the plaintiff, is based upon a statute of the United States defining the liability of railroads for the death of its employes. The statute provides in
160 substance that the railroad shall be liable to the extent to be defined by the court, where the death is due to the negligence of the railroad company. What is negligence under this statute is a question of federal law, and you cannot return a verdict for the plaintiff unless you find that the defendant has been negligent within the meaning of this law, as such negligence under this law will be defined in the court's instructions.

4. The act of Congress, by virtue of which this action is maintained, provides as follows:

That every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband, and children, of such em-

ployee, and if none then of such employee's parents, and if none, then to the next of his kin dependent upon such employee, for such injury or death resulting in whole or in part from the
161 negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section three of the act in question likewise provides, That no actions hereafter brought against any such common carrier by railroad under or by virtue of the provisions of this act to recover damages for personal injury to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Which said instruction was Plaintiff's Requested Instruction No. 3, and, upon the settlement, as aforesaid, of the Court's Instructions No-. 3 and 4 above set forth, the following proceedings were had:

By Mr. Veazey: As regards Plaintiff's Requested Instruction No. 3, stating that the Act of Congress, by virtue of which the action is brought, is as follows, and setting forth the act, and as regards the other instructions (herein set forth as ultimately given by the Court) stating that the action is brought under that statute, I take it that we are not deemed to waive our objections that the proof shows that the action cannot be maintained under that
162 statute for the reasons stated in our motions?

By the Court: You have embodied that in your Instruction No. 1, which will be refused and of course you will have your exception to that ruling of the court.

By Mr. Veazey: It is unnecessary for us to make additional objections and take exceptions as to that phase of the case?

By the Court: Yes.

5. It will be noticed that the Plaintiff claims that the injuries which were sustained by Mr. Hall, which resulted in his death, were caused by the negligent acts of the defendant company, in the particulars already mentioned. This renders its necessary that I should define to you what constitutes actionable negligence is. Actionable negligence consists in the failure to exercise ordinary care toward a person to whom the defendant owes a duty to observe ordinary care, by which failure the person injured, without contributory negligence on his part, has suffered injury to his person. And by ordinary care is meant such care as a person of ordinary prudence would ordinarily exercise under the circumstances surrounding the case.

6. Negligence, within the meaning of the Federal law relating to the liability of railroads for an injury to or for a death of an employee, is merely the failure to discharge such duty, if
163 any, to use care as the law imposes upon the railroad company for the benefit or protection of the employee. Before, therefore, you can return a verdict for the plaintiff you must find

three things. 1st: Under the court's instructions was any duty to use care imposed by law upon the defendant for the benefit of the deceased employe, and if so what was that duty? 2nd: Did the defendant violate that duty? 3rd: Did such violation, if any, cause the death of the employee? It is essential to a recovery by the plaintiff that all of these three conditions be established by a preponderence of the evidence, and if any one of them is not established by a preponderence of the evidence, you should return a verdict for the defendant.

7. A plaintiff, in any negligence case, can recover, if at all, only upon establishing by a preponderance of the evidence that the defendant has been negligent in the matters complained of in the complaint. It is by the complaint alone that the defendant is advised of the ground and facts upon which it is sought to obtain a judgment against the defendant and it is only the allegations or statements in the complaint which the defendant is called upon to answer. In this case the sole ground of negligence charged is found in the statement in the complaint to the effect that on the 11th day of October, 1911, and for a long time prior thereto
164 the defendant negligently and carelessly allowed and permitted its right-of-way, track and property to be and remain unfenced on both sides thereof, at and near the place where John P. Hall, deceased, named in the complaint, was killed. The only ground of negligence charged, therefore, of which the defendant has been advised is made, relates solely to the matter of fencing. You are not, therefore, permitted to consider whether, in your opinion, the defendant was, or was not, negligent in other matters, if any, but, in determining whether or not defendant was, negligent, you are confined to the single issue as to the matter of fencing, and you cannot return a verdict for the plaintiff unless you find in the court's instructions what duty, if any, rested upon the defendant in the matter of fencing, and that the defendant violated that duty.

8. Negligence, within the meaning of the Federal law relating to the liability of railroads for an injury to or for the death of an employee, is the failure to discharge such a duty, if any, to use care to avoid injury, as is imposed by the law, that is to say, by failing to exercise generally such care as the average reasonably prudent person would ordinarily exercise under the circumstances. The test for negligence is not whether the defendant has done all that could or even would be done, but whether defendant has
165 omitted to do something that the average reasonably prudent person, under all the circumstances, would ordinarily have done; in other words, you cannot return a verdict in favor of the plaintiff unless you find from the evidence that defendant's conduct was inconsistent with that of the average reasonably prudent person, under all the circumstances.

9. The duty imposed by statute upon a railroad company at certain places and under certain circumstances, to fence its railroad is, as far as the case is concerned, owing only to, and for the protection of, the owners of livestock, for a violation of which, under

certain circumstances, the owner of the stock may recover damages for the loss of stock which may stray upon the track and be killed in the operation of a train, without proving negligence on the part of the railway company's employees in the operation of the train; but this is not a duty imposed by statute to, or for the benefit of employees on a train, and, for a failure to fence in the manner provided by statute at any place, the employee, for an injury, or his administrator, in case of a death, cannot recover, even though the employee was injured or killed by reason of a collision with livestock, and thereby, in a particular case, the train was derailed, and such livestock got on the right of way by reason of the want of a fence.

166 10. In this kind of case you are instructed that a mere failure, if any, to construct or maintain a fence along its railroad track does not of itself constitute negligence on the part of the railway company. You cannot find the railroad company negligent in the matter of fencing unless you find that it did not construct or maintain a fence and in addition that the average reasonably prudent person, in the situation of the defendant, and under all the circumstances, would have constructed or maintained a fence. In other words you cannot return a verdict for the plaintiff unless you find not only that no fence was constructed or maintained, but also that defendant's failure, if any, in this respect was inconsistent with what would be the conduct of the average reasonably prudent person under all the circumstances disclosed by the evidence.

11. You are instructed that the Montana law in regard to the duty resting upon a railroad company in certain places and under certain circumstances, to fence its track, is not a statute enacted for the safety of employees within the meaning of the Federal statute relating to the liability of railroads for an injury to or for the death of an employee, and especially within the meaning of that part thereof relating to the defense of assumption of risk and contributory negligence.

167 12. You are instructed that if the defendant company, in the present case, in the exercise of reasonable care, knew that the track in question was not fenced, and likewise knew, or in the exercise of reasonable care could have ascertained that the track in question run through a portion of country where cattle were in such numbers and in such proximity to the track that they were likely to get upon the track because of the absence of a fence, if you find such to be the case, and the company likewise knew, or in the exercise of reasonable care could have ascertained that the cattle so getting upon the track were likely to cause the derailment of trains, and the company knew or in the exercise of reasonable care could have ascertained that the cattle in question by the construction of a fence would be prevented from getting upon the track, and the derailment of trains would, by reason of that fact, be avoided, and knowing all of these facts the company neglected to construct a fence, and you further find, by reason of the absence of the fence on the occasion in question, a cow got upon the track and caused the derailment of the train, and by reason of such derailment Mr. Hall suffered the injuries

which resulted in his death, then the company, under the circumstances, would be responsible for the damages which Mr. Hall's death has occasioned.

168 The foregoing Instruction No. 12 was requested by the plaintiff and, upon the settlement of the instructions as aforesaid, the said defendant Great Northern Railway Company duly objected and excepted to said instruction, on the ground that it assumes as a fact that cattle were in such numbers there and in such close proximity to the track that they were likely to get upon the track because of the absence of the fence, and it assumes that cattle were likely to get upon the track, and assumes as a fact that the company in the exercise of reasonable care could have ascertained that the cattle so getting upon the track were likely to cause the derailment of trains, and it assumes as a fact that the cattle in question by the construction of a fence would be prevented from getting on the track and that thereby the derailment of trains would be avoided, and it assumes as a fact that cattle on the track would cause the derailment of trains. Said defendant, as aforesaid, further objected and excepted to said instruction on the ground that it does not draw the distinction between trains backing and trains running ahead in the ordinary manner, and on the ground that it imposes a positive liability upon the defendant upon the facts stated, irrespective of whether or not under the facts stated the average reasonably prudent person would ordinarily have fenced the line; in other words, said instruction advises the jury that under those facts assumed in the

169 instruction to exist, the average reasonably prudent person would fence the line, and the court thereby determines for itself—for the jury—what the average reasonably prudent person would have done under those circumstances, whereas, under the other instructions to be given by the court, defining what is negligence, the Court advises the jury that it is for the jury to determine under all the facts in the case what the average reasonably prudent person would have done. Said defendant also, as aforesaid, duly objected and excepted to said instruction on the further ground that it submits to the jury the question as to whether there was a duty to fence at common law, whereas, under all the Federal decisions and under the Federal law and under every law and the common law, there is and was no duty owing to the plaintiff's intestate to fence the track in question, and the failure to fence the track in question could not be a violation of a duty owing to him, and on the ground that there is no fact justifying the submission to the jury of any issue as to whether or not trains are liable to be derailed by striking stock, the uncontradicted evidence being to the effect that such derailments are very rare and that they are not likely to occur, and, under the Federal law, under which the Court has charged that this case is brought and under which the Court has permitted this

170 case to be brought, a failure to fence does not constitute negligence.

Which said objections were, and each of them was, thereupon by the Court overruled, to which ruling of the Court the said defendant, by its counsel, then and there as aforesaid duly excepted, for the

reasons stated in said objections, which said exceptions were, and each of them was, then and there duly noted and allowed.

13. In this action the fact, if you find it to be a fact, that the deceased was guilty of contributory negligence, does not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such deceased.

14. It was the duty of deceased to exercise such reasonable care and caution for his own safety as would ordinarily have been exercised by an ordinarily prudent person under the circumstances then and there existing; and if you find from the evidence that he failed in any respect to exercise such reasonable care and caution and that but for such failure on his part the accident would not have occurred, or if by the exercise on his part of such care and caution the accident would or could have been avoided, then deceased was guilty of contributory negligence.

15. An employee assumes all the usual and ordinary risks attendant upon his employment not arising from the negligence of his employer and he assumes also all risks arising even from the
171 negligence of his employer if he knows and appreciates or in the exercise of reasonable care would ordinarily know and appreciate such conditions and the dangers, if any, resulting from such conditions. For damages resulting from such conditions and dangers under the conditions aforesaid, the employer is not liable. Hence, if you find from the evidence that the deceased was killed by reason of an ordinary risk, if any, attendant upon his employment, the defendant is not liable. Moreover, if you find from the evidence that the defendant allowed and permitted its right of way and track to be unfenced and that thereby cattle were likely to cause the derailment of trains through collisions, and that this was negligence, nevertheless the plaintiff cannot recover, if you further find that such conditions and the dangers, if any, which might flow therefrom, were known to and appreciated by the deceased, or in the exercise of such reasonable care as the average reasonably prudent person, under all the circumstances, ordinarily would have exercised, would have been known to the deceased.

16. This action is an action to recover the damages said to have been sustained by the widow and children of the deceased by reason of his death, which is said to have been caused by a wrongful act or neglect of the defendant. It is grounded upon an alleged
172 original wrongful injury to the deceased, without proof of the existence of which the action cannot be maintained. Secondly, it is maintained and prosecuted for the sole and exclusive benefit of the widow and children of the deceased. Third, the only damages which are recoverable are the loss, if any, by the widow and children of such pecuniary benefits which they might reasonably have received if the deceased had not died of his injuries. The damages are limited to those items of loss only which have a pecuniary value, that is, those items which are of such a nature that their value can be estimated in money. No compensation can be made for damages in any case by way of grief or wounded feelings. The sole question for you to consider in the matter of damages

is what would be the reasonable present money value to the widow and children of the pecuniary benefits which they would probably have received if the deceased had not been killed as aforesaid.

17. In assessing damages, in the event that you shall return a verdict for plaintiff, you must bear in mind that your verdict would, in that event, include future loss, if any. But in fixing the extent of that future loss in your verdict, you must remember that the same must be paid by the defendant forthwith and defendant will not be permitted to pay it in instalments extending over years.
173 Hence you must make allowance by way of deduction in consideration of the fact aforesaid that it is the present value of all future pecuniary loss, if any, which must be ascertained by you.

18. The test as to damages is not what it would cost to get an annuity from an insurance company equal to the sums which you might find the deceased would have contributed to his family. The cost of such annuity is simply evidence for you to consider in determining what the loss was. So also the mortality tables of the insurance company are not proofs binding upon you that the deceased would have lived any length of time, but are merely to be considered by you in determining the probable length of time that he would have lived, taking into consideration his age, habits, occupation, and health, and any other matters bearing on this question.

19. Evidence has been introduced touching the question as to the probable length of life of Mr. Hall, also as to his earnings, and as to the amount of money which was turned over by him for the sustenance of the family. This evidence is not controlling upon you. It may, however, be taken into consideration in connection with all the other evidence in the case for the purpose of fixing the amount of damages which the heirs sustained. In that connection, however, you should likewise consider the decreased earning capacity
174 of the deceased, due to age, illness, or other infirmity, the fluctuation of earning capacity, the ability to procure employment, and all other facts and circumstances which would affect his employment and the compensation which he might receive, and the sums which the heirs might receive from his earnings, had he lived.

20. You are not to understand from any ruling of the court that the court has held that the defendant was negligent or that the deceased did not assume the risk. The court has merely decided that, as the facts must be decided by the jury, it is for the jury to decide whether defendant ought to have fenced and that it is for the jury to decide whether Conductor Hall was ignorant of the want of a fence and of the likelihood of stock getting on defendant's right of way, and of the dangers, if any, likely to be encountered by collision with said stock, if any. The court has merely decided that the parties are entitled to have these questions decided by twelve persons, viz: the jury, rather than by one person, viz: the court.

21. The burden of proof is upon the plaintiff to show that the company was negligent in the particulars stated, and that the negligence in question occasioned the injury complained of and the

damages, and, unless this is done by a preponderance of the evidence, your verdict should be for the defendant.

175 22. The defense of Contributory Negligence and Assumed Risk are affirmative defenses interposed by the defendant company, and the burden of proof is upon the company to sustain them or either of them.

23. Under the provisions of the law in question, the action is maintained by the personal representative of the deceased in behalf of the heirs of the deceased, and in this case the heirs are the widow and children. You are instructed that the damages recoverable have to do with the pecuniary loss suffered by the persons named. And in determining that loss in the case of the children, you may take into consideration the loss, if any, which the children have sustained through the loss of care, counsel, training, or education which they might have reasonably received from their father had he lived. Loss of comfort and society cannot be considered by you in estimating the damages, should you find that plaintiff is entitled to recover any. And you will fix in your verdict, should you render one in favor of the plaintiff, the specific amount that each one of the heirs should receive.

Which said instruction was an instruction requested by the plaintiff, and, upon the settlement of the instructions as aforesaid, the said defendant Great Northern Railway Company duly objected and excepted to said instruction in so far as it advises the jury

176 that it may take into consideration the loss, if any, which the children have sustained through the loss of care, counsel or training which they might reasonably have received from their father, had he lived, on the ground that there is no evidence justifying the submission of that issue, and on the ground that the same is not limited to pecuniary loss thereby sustained, if any, or to loss of that nature, if any, having a pecuniary or money value, and said portion of said instruction is therefore inconsistent with the court's instruction to the effect that the loss must be merely the pecuniary loss, and is therefore confusing and misleading to the jury. Said defendant further objected and excepted, as aforesaid, to said instruction, in so far as it advises the jury that it should fix in its verdict the specific amount that each one of the heirs should receive without advising the jury that they must not award any greater amount by reason of the number of heirs than the total amount which is to be awarded by the jury.

Which said objections were, and each of them was, thereupon by the court overruled, to which ruling of the court the said defendant, by its counsel, then and there, as aforesaid, duly excepted, which said exceptions were, and each of them was, thereupon duly noted and allowed.

24. Two thirds of your number are sufficient to bring in a verdict.

177 When you retire to your jury room, you will select one of your number foreman, and he will sign your verdict.

The foregoing are all of the instructions given by the Court.

Of the instructions requested by the defendant Great Northern

Railway Company, hereinbefore referred to, the Court refused the following, and upon each thereof endorsed the words "Refused, John A. Matthews, Judge";

1A. You are instructed to return a verdict for the defendant.

To the refusal of the Court to give said requested instruction the defendant Great Northern Railway Company, by its counsel, then and there, as aforesaid, duly excepted, which said exception was thereupon duly noted and allowed.

1B. You are instructed that under the uncontradicted evidence in this case the deceased was not at the time of his injury employed by defendant in interstate commerce.

To the refusal of the Court to give said requested instruction the defendant Great Northern Railway Company, by its counsel, then and there, as aforesaid, duly excepted, which said exception was thereupon duly noted and allowed.

1C. You are instructed that under the uncontradicted evidence in this case the defendant in operating the train which was
178 derailed and in doing the work which the deceased and his associates were doing was not engaged in interstate commerce.

To the refusal of the Court to give said requested instruction the defendant Great Northern Railway Company, by its counsel, then and there, as aforesaid, duly excepted, which said exception was thereupon duly noted and allowed.

9. There is no law in Montana which requires a railroad company, for the benefit or protection of its employes on any train, to fence its track to prevent cattle from straying upon its track, or otherwise, and a railroad company operating in Montana is not liable for injuries sustained by an employe, or for his death, from a derailment caused by collision with stock that had strayed upon the track because it had not been fenced against them.

To the refusal of the Court to give said requested instruction the defendant Great Northern Railway Company, by its counsel, then and there, as aforesaid, duly excepted, which said exception was thereupon duly noted and allowed.

13. You are instructed that if the plaintiff's intestate had two or more ways of proceeding, one of which was dangerous and the other safe or less dangerous, and he voluntarily and unnecessarily and without there being any emergency, chose the dangerous or more dangerous way, and his death would not have occurred had
179 he chosen the safe or less dangerous way, then he assumed the risk of the choice of ways so voluntarily made.

To the refusal of the Court to give said requested instruction the defendant Great Northern Railway Company, by its counsel, then and there, as aforesaid, duly excepted, which said exception was thereupon duly noted and allowed.

The remaining instructions requested by the defendant were withdrawn by the defendant and no exception taken to the Court not giving the same, except as regards the foregoing requested instructions above set forth.

Thereupon the Court instructed the jury in accordance with its instructions as hereinbefore set forth, and thereupon, after the court

had instructed the jury as aforesaid, said cause was thereupon submitted to the jury for decision.

Thereupon the jury retired to consider of its verdict, and returned into court on the 6th day of December, 1913, with its verdict in favor of the plaintiff and against the defendant Great Northern Railway Company and assessing the plaintiff's damage at the sum of Fifteen Thousand Dollars ($15,000.00), which said verdict so rendered and returned was and is in words and figures as follows:

(Title of Court.)

(Title of Cause.)

Verdict.

180 We, the Jury in the above entitled cause, find for the plaintiff, and assess his damages at Fifteen Thousand Dollars; and, of the sum thus found, we apportion to the heirs the following sums:

To the widow, Cassandra E. Hall, Six Thousand Dollars (6,000.00),
To the daughter, Aildeen, One Thousand Dollars (1,000.00),
To the son, Eugene Clarence, One Thousand Dollars (1,000.00)
To the daughter Pauline, Fifteen Hundred Dollars (1,500.00),
To the daughter, Grace, Twenty Five Hundred Dollars (2,500.00),
To the daughter, Dorothy, Three Thousand Dollars (3,000.00).

(Signed) JOSEPH SINDELAR, *Foreman.*

Thereupon, and on the 8th day of December, 1913, judgment was rendered upon said verdict in favor of the plaintiff and against the defendant Great Northern Railway Company, and on the 8th day of December, A. D. 1913, said judgment was first duly entered, of the entry of which said judgment the defendant Great Northern Railway Company first received notice on the 9th day of December,

A. D. 1913, and before said date said defendant had not
181 received any notice, written or otherwise, of the entry of said judgment.

That upon said verdict being returned, the Court and its said Judge who tried said cause, by consent of plaintiff by his counsel, by stipulation duly signed in writing, extended the time within which the said defendant might prepare and serve a Bill of Exceptions of said Defendant to the rulings made or proceedings had on the trial of the above-entitled cause, or to be used on motion for a new trial, to and including the 6th day of February, A. D. 1914.

And now, within the time allowed by law and the order of the above-entitled Court and its said Judge, comes the said defendant and presents the foregoing as and for its Bill of Exceptions to the rulings made and proceedings had on the trial of the above-entitled cause and to be used on its motion for a new trial, and said defendant prays that the same may be signed, settled and allowed as such.

VEAZEY & VEAZEY AND
NOFFSINGER & WALCHLI,
Attorneys for Defendant Great Northern Railway Company.

Admission of Service of Bill of Exceptions.

Due and personal service of the foregoing Bill of Exceptions made and admitted, and receipt of copy acknowledged, this 4th day of February, A. D. 1914.

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WALSH, NOLAN & SCALLON,
LOGAN & CHILD,
Attorneys for Plaintiff.

It is hereby stipulated that the foregoing Bill of Exceptions is true and correct, and that the same may be settled and allowed and signed and certified as Defendant's Bill of Exceptions to the rulings made and proceedings had on the trial of the above-entitled cause.

Dated this 5th day of May, A. D. 1914.

WALSH, NOLAN & SCALLON,
LOGAN & CHILD,
Attorneys for Plaintiff.
NOFFSINGER & WALCHLI AND
VEAZEY AND VEAZEY,
Attorneys for Defendant.

(Title of Court and Cause.)

Certificate Settling Bill of Exceptions.

The Bill of Exceptions of the defendant in the above-entitled cause, duly and regularly served, together with plaintiff's amendments thereto, duly and regularly served, having been duly and regularly presented to the undersigned, the Judge who tried said cause, for settlement, and the said amendments having been passed upon, allowed, or modified by the undersigned and incor-

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porated in said Bill of Exceptions, and the matter of the final settlement of the foregoing Bill of Exceptions aforesaid coming on now regularly to be heard,

This is to certify, pursuant also to stipulation between said parties, that the foregoing Bill of Exceptions is correct and sets forth all of the evidence offered on the trial of the said cause, and that where the said evidence appears therein by questions and answers the same is necessary clearly to present for review the objections made and exceptions taken at said trial and the grounds thereof, and the said Bill of Exceptions is hereby settled, signed and allowed as and for the Bill of Exceptions of the defendant in the above-entitled cause, to the rulings made and the proceedings had on the trial of said cause, and to be used on motion for a new trial.

Dated at Townsend, Montana, this 8th day of June A. D. 1914.

JOHN A. MATTHEWS,
Presiding Judge Who Tried said Cause.

Bill of Exceptions Indorsed: Filed July 1st, 1914.

(Title of Court and Cause.)

Order Denying Motion for New Trial.

184 This matter coming on regularly to be heard, was duly submitted to the court at Townsend in Broadwater County, Montana, under the stipulation of counsel that the Motion of defendant for a new trial might be heard at said place and there determined and thereafter, upon the filing of the court's order and decision thereon in Flathead County, the same shall have the same force and effect as though made and filed in open court in said Flathead County;

Now therefore the court having fully heard and determined the said motion finds that the grounds therein urged are not sufficient to entitle the defendant to a new trial and that the said motion for a new trial should be overruled.

It is therefore ordered that said motion be and the same is hereby overruled.

It is further ordered that this order be filed in said cause in Flathead County and when so filed the same shall have the same force and effect as though made in open Court in said Flathead County.

Done at Townsend, this 28th day of August A. D. 1914.

JOHN A. MATTHEWS,
Judge Presiding.

Indorsed: Filed August 31st, 1914.

(Title of Court and Cause.)

185 *Notice of Appeal.*

To the plaintiff in the above entitled cause and to Messrs. Walsh, Nolan & Scallon and Messrs. Logan & Child, attorneys for the plaintiff:

You and each of you will please take notice that the defendant, Great Northern Railway Company in the above entitled cause, hereby appeals to the Supreme Court of the State of Montana from the judgment dated in the above entitled cause on the 8th day of December, A. D. 1913, and rendered by the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, upon a verdict of a jury in favor of the plaintiff and against the defendant, Great Northern Railway Company, and assesseing damages at the sum of Fifteen thousand dollars ($15,000), which said judgment is in favor of the plaintiff and against the said defendant, Great Northern Railway Company, for the principal sum of Fifteen Thousand Dollars ($15,000), and which said judgment is the final and only judgment in said cause. Said appeal is taken from said judgment and from the whole thereof.

NOFFSINGER & WALCHLI AND
186 VEAZEY & VEAZEY,
Attorneys for Defendant, Great Northern Railway Company.

Due service of the within Notice of Appeal, this 2n- day of December 1914 is hereby admitted.

WALSH, NOLAN & SCALLON,
LOGAN & CHILD,
Attorneys for Plaintiff.

Indorsed: Filed Dec. 2, 1914.

187 *Clerk's Certificate to Transcript on Appeal.*

STATE OF MONTANA,
County of Flathead, ss:

The undersigned, as Clerk of the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, does hereby certify and declare, as such Clerk, that the foregoing transcript, consisting of 186 pages, contains and sets forth full, true and correct copies of the following original papers on file in the office of the Clerk of said District Court, in an action in said District Court entitled J. C. Alexander, Administrator of the Estate of John P. Hall, Deceased, Plaintiff, vs. Great Northern Railway Company, a Corporation, Defendant, to-wit:

I. (1) The complaint, (2) The demurrer of the defendant Great Northern Railway Company, (3) The order of the Court overruling said demurrer, (4) The answer of the defendant Great Northern Railway Company, (5) The reply of the plaintiff to said answer, (6) The verdict of the jury, (7) The judgment made, rendered, entered and filed in said cause on the 8th day of December, A. D. 1913, which said papers constitute the judgment roll in said cause.

188 II. The Bill of Exceptions of said defendant Great Northern Railway Company to the rulings made and proceedings had on the trial of said cause, and used on the motion of said defendant for a new trial.

IV. The order denying a new trial herein, which said order was made in said cause on the 28th day of August, A. D. 1914, and filed on the 31st day of August, A. D. 1914.

V. The notice of appeal of Great Northern Railway Company from said judgment, which said notice was filed December 2*th*, 1914.

The undersigned does further certify, as such Clerk, that undertakings on said appeals from said judgment, in due form, has been properly filed in said cause in the office of the Clerk of said District Court.

In witness whereof, I have hereunto set my hand and the seal of said District Court at Kalispell in Flathead County, Montana, this 25th day of January, A. D. 1915.

[COURT SEAL.] SAM D. McNEELY,
As Clerk of the District Court of the Eleventh Judicial District of the State of Montana in and for the County of Flathead.

189 *Order for Judgment.*

Minutes of the Supreme Court, State of Montana, Twenty-second Day of December Term, 1915, Thursday, January 20, 1916.

Court convened pursuant to recess.

Present:

Hon. Theo. Brantly, Chief Justice.
" Sydney Sanner, Associate Justice.
" Wm. L. Holloway, Associate Justice.
J. T. Carroll, Clerk.
M. N. Race, Marshal.

And the following proceeding was had:

3574.

J. C. ALEXANDER, Adm., Respondent,
v.
GREAT NORTHERN RY. CO., Appellant.

This cause this day came on for the judgment and decision of the Court.

Whereupon, after due consideration, it is here ordered and adjudged by this Court, that the judgment of the Court below, made on the 8th day of December, 1913, and the order overruling motion for a new trial, made and entered on the 31 day of August, 1914, be, and they are hereby affirmed at the cost of the appellant.

THEO. BRANTLY,
Chief Justice.

Attest:
J. T. CARROLL, *Clerk.*

190 STATE OF MONTANA:

In the Supreme Court, December Term, 1915.

No. 3574.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Plaintiff and Respondent,
v.
GREAT NORTHERN RAILWAY COMPANY, Defendant and Appellant.

Submitted January 4, 1916; Decided January 20, 1916.

Filed: January 20, 1916.
J. T. CARROLL, *Clerk.*

191 Mr. Justice SANNER delivered the Opinion of the Court:

On October 11, 1011, John P. Hall, a conductor in the service of the Great Northern Railway Company, was killed near Batavia, in Flathead county, this state, as the result of a derailment of his caboose consequent upon a collision of his train with a cow. This action, brought to recover for his death, resulted in a verdict against the company, upon which verdict judgment was duly entered. From that judgment as well as from an order denying it a new trial, the company has appealed.

A reversal is sought upon four grounds, viz: (1) The complaint alleges, but the proof does not establish, that Hall was employed in inter-state commerce at the time of his death; (2) no actionable negligence on the part of the appellant is alleged or proved; (3) the evidence shows a clear case of assumed risk, and (4) substantial errors of law prejudicial to the appellant, occurring at the trial.

1. The allegations of the complaint stamp the case as brought under the provisions of the Federal Employers' Liability Act, and, to maintain it as such, evidence that at the time concerned, the company was engaged, and the decedent was employed, in interstate commerce was indispensable. (North Carolina R. R. Co. v. Zachary, 232 U. S. 248.) The facts established touching this phase of the case are: The defendant company is a common carrier whose main line extends from St. Paul, Minnesota, to the Puget Sound,
192 Washington, traversing this and other states; it owns and operates a branch line called the Marion Branch, running from its main line at Columbia Falls through Kalispell, Batavia and Kila to Marion, and from this branch a shorter branch or tributary connects Kalispell with Somers; this Marion Branch with its tributary lies wholly within Montana, but it is the source as well as the ultimate destination of both inter-state and intra-state traffic. The decedent was killed while in charge of one of defendant's work-trains, his particular duty with such train being to load ties from various places along the branch where they had been left by the persons who had cut the same, and to take the cars so loaded to Kalispell or leave them at Kila or other convenient siding; from such places of deposit the ties would later be taken by other trains to the defendant's tie-treating plant at Somers, whence, after treatment to increase their durability, they would be sent to various points upon the main line or branches of the appellant or its affiliated companies within or without this state as might be required for construction, renewals or repairs.

Did the work of the decedent constitute employment in inter-state commerce? The answer may be found, we think, in the decisions of that great tribunal whose pronouncements are final in matters of this kind, and particularly in Pederson v. Delaware, L. & W. R. Co., 229 U. S. 146, cited by the respondent, where the following criterion is suggested: "Was that work being done independently of the inter-state commerce in which the defendant was engaged, or was it so closely connected therewith as to be part of it? Was its per-
193 formance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty imposed upon the

carrier?" Interdependence to some extent pervades all activity, and it is true, for instance, that an inter-state railroad cannot perform its functions without fuel or without ties; but this does not justify the inference that persons hired by it to mine coal or to cut ties are employed in inter-state commerce. (Delaware, L. & W. R. Co. v. Yarkonis, 238 U. S. 439; Bravis v. Chicago, M. & St. P. Ry. Co., 217 Fed. 234.) In the chain of events by which the standing timber should be connected with the appellant's roadbed, the decedent was one step nearer to the latter than the man who furnished the ties; but considring that the decedent had nothing to do with the ties further than to load them upon cars, leaving the cars so loaded at convenient sidings to be removed by others, that the ties so loaded were not to be marketed or used but were to be taken to Somers and made ready for use, that no one knew when, where or how they would ultimately be used, and that so far as exigency or duty is shown, the appellant's inter-state commerce might go on unaffected whether these ties were gathered or not, the connection of his work with such commerce still appears to have been rather remote. No case has been called to our attention which in its facts closely resembles the one at bar; but in Illinois C. Ry. Co. v. Behrens, 233 U. S. 473, it was held that employment in inter-state commerce was not shown where the fireman of a switch engine operating within the city of New Orleans was killed while moving cars loaded with intra-state freight, notwithstanding that his general duties had to do with cars of all classes, often commingling those loaded with inter-state freight and those empty or loaded with freight of an intra-state character,
or rapidly passing from one class to the other. Accepting
194 this as authoritative, we are impelled to the view that the decedent was not at the time of his death employed in inter-state commerce, and therefore the action was not sustained under the Federal Employers' Liability Act.

It does not follow from this, however, that the appellant was or is entitled to a reversal. It is now settled that where the complaint declares under the federal law, failure to sustain it under such law is not fatal, but recovery may still be had under the state law, if the pleadings and proof are sufficient under the state law. (Wabash R. R. Co. v. Hayes, 234 U. S. 86; Jones v. C. & O. Ry. Co., 149 S. W. 951.) We recall but one respect in which a defendant can be seriously prejudiced in such a situation, and that is where, by reason of diverse citizenship, removal of the cause to the federal court might be in order. In such a situation, however, the defendant must assert its right, under penalty of waiver, by filing a petition to remove at the first opportunity. (Powers v. Railway Co., 169 U. S. 92; Kansas City etc. Ry. Co. v. Daughtry, 130 U. S. 298; Golden v. Northern Pac. Ry. Co., 39 Mont. 435; Dempster v. Oregon Short Line R. R. Co., 37 Mont. 335.) This the appellant did not do; instead, and with knowledge of its right to have the cause removed, it submitted to the jurisdiction of the state court in which the trial occurred, by seeking a dismissal for variance as well as for failure to show the breach of it of any legal duty to the decedent under either state or federal law.

2. The negligence charged in the complaint is the failure of

appellant to fence its track at and near the place where Hall was killed and thus to exclude cattle, the presence of which upon
195 the track was likely to cause derailment of its trains, and in permitting its trains to be run over said track while the same was so unfenced. The question raised upon the pleadings and the evidence are whether under any circumstances a railway company can owe any duty to its train operatives to shield them from whatever danger the presence of cattle upon its track may cause, by fencing such track; and, if so, whether facts sufficient were made to appear in this case to establish prima facie the existence of such duty. The appellant vigorously denies that any such duty ever exists, while the respondent contends that such duty may exist and in the present instance did exist—not in virtue of the fencing statute of this state (Rev. Codes, sec. 4308) which was enacted for the benefit of stock owners (Nixon v. Montana etc. Ry. Co., 50 Mont. 95), but in virtue of appellant's common law obligation to exercise ordinary care to furnish its employees with a reasonably safe place in which to work. As regards the general proposition, the authorities are by no means harmonious, but we think the better reasoning supports the respondent's position. Speaking broadly, the obligations of a railway to its employees are not different in principle from those of other masters to their servants, and when the place of work to which the servant is detailed, is the track or roadway of the master, the duty to exercise reasonable diligence to keep it safe should and does arise. Indeed, little if any difficulty is found in the application of this rule where defects in the track or roadway or inanimate obstructions are involved and we cannot see why any should arise from the mere fact that the obstruction is animate. "Unless a railway track is fenced, cattle are liable to stray upon it from adjacent fields
196 and commons; cattle upon a railway track are liable to get run over by trains notwithstanding the vigilance of the engineer and other trainmen; engines and trains are frequently derailed by running over cattle upon the track; in such derailments trainmen are frequently killed or injured. These propositions of fact, which are abundantly borne out by the judicial reports, argue a duty upon the part of railroad companies toward their own employees of fencing their tracks so as to keep out trespassing animals." (4 Thompson on Negligence, sec. 4319.) In Donegan v. Erhardt, 23 N. E. 1051, the New York Court of Appeals considering the case of a trainman who had been injured through the collision of his train with a horse and whose judgment against the railroad company had been reversed by the General Term upon the ground that the only responsibility of a railroad company for defective fences is that mentioned in the statute, and that at common law, independently of statute, a railroad company would not have been liable for injuries sustained by him, said: "We think the learned General Term fell into error. A railroad company, for the safety of its passengers as well as its employees upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid, and the roadbed properly constructed, and reasonable prudence and

care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common law principles, must be held
197 responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find upon the facts of a case, that it was the duty of a railroad company to fence its track to guard against such danger." (See also Dickson v. Omaha & St. L. Ry. Co., 27 S. W. 476, (Mo.); I. & G. N. Ry. Co. v. Thompson, 77 S. W 439, (Tex.); Fordyce et al. v. Jackson, 20 S. W. 528, (Ark.); Lackawanna etc. Ry. Co. v. Chenowith, 52 Pa. St. 382; Sullivan v. P. & R. Co., 30 Pa. St. 698.)

Nor are all the cases cited by appellant really opposed to this conclusion. Some of them are not in point, and in most of the others the judicial mind seems to have been occupied with the notion of absolute duty to fence independently of statute. To be sure, there is no such duty. Whether, in the absence of statute, a railway company ought to fence its tracks at all, and where it ought to fence, depends, so far as its employes are concerned, upon the existence of circumstances from which it may be said that without such precautions due care has not been exercised. In the present case, however, we know that cattle are permitted to run at large in this state; it is conceded that appellant's track is not and never has been fenced, and it is not disputed that fencing is the device commonly employed to effect the exclusion of cattle; there is evidence to show that some public domain exists in the neighborhood of the accident, and from it there is unob-
198 structed access to the appellant's right of way and track, that cattle abound in the adjacent country and commonly run at large, that they frequent the vicinity of the accident attracted by the water-supply, that they often come upon the track, that encounters between them and moving trains were not unusual, that they are, potentially at least, a socurce of danger to such trains, and that all this was known to the appellant prior to the time of the accident. Under such conditions the failure to fence so as to keep out cattle, the consequent straying of the cow upon the track, the consequent running over the cow while on the track and the consequent derailment of decedent's train, resulting in his death, form a collection of facts which plainly constitute evidence of negligence, making a question for the determination of the jury.

3. It is contended that a case of assumed risk is shown in two respects. The first of these is "improper use of appliances or choice of ways," and it is based upon the fact that the train was backing at the time, coupled with the proposition that this is a forbidden as well as a more dangerous method of operation. As to the "forbidden" feature it will suffice to say that though Mr. Smith—a wit-

ness for appellant and one of its division superintendents—testifies that under the oral instructions given by him to the train masters for dissemination among trainmen, the decedent should have proceeded with the engine foremost, we fail to find any evidence of such instructions communicated to the decedent; that the imperative directions of the company to its employees touching the operation of trains are embodied in its published bulletins and rules, none of which were shown to have been contravened; that under the
199 rules, according to Mr. Smith, "a work-train has the right to run in both directions, * * * has the right to back up, with the cars in front of the engine when absolutely necessary; he has got to; you can't get away from that proposition." To this we may add that according to some of the testimony the train was being handled in the manner customary with work-trains, and this, if true, tends to show that no such oral instructions existed, or that they were merely suggestive in character, or that their observance had been waived.

Whether a recovery in this case was barred by the choice of a more dangerous way is another matter and depends upon circumstances which we will now proceed to consider. The decedent and his crew, having at the close of the day of October 11 loaded all their available cars, found it necessary to procure more at Kalispell; for that purpose they started eastward from Kila about 7:40 P. M.; it was then dark; the train consisted of the caboose, two outfit cars in which the crew lived, and the engine with its tender; the caboose was at the easterly end of the train and the engine was it its westerly end, pushing it towards its destination; they proceeded at the rate of ten or twelve miles an hour for some distance, until, about a mile and a quarter west of Batavia, they ran over a cow, causing the caboose to be derailed and the conductor to be killed. The argument is that a derailment was more likely from running over a cow with the caboose ahead, than if the tender had been ahead and the caboose behind; that such a transportation could have been made; that had it been made, the decedent would not have been killed even if a derailment had occurred; and that since these things are so, the decedent assumed the risk, his choice of the more dangerous way having been a voluntary one. The law upon this
200 subject is fairly well settled in this state. It is, that contributory negligence will be imputed, as a matter of law, to one who, having a duty to perform and a choice of ways to perform it, knowingly and voluntarily chooses the way which is obviously dangerous to the way which is safe, or the way which is obviously more dangerous to that which is less so, unless his choice was justified by an emergency; but in balancing ways for the purpose of making a choice between them, the rule does not require a choice unerring in the light of after-events; it requires such a choice as under all the known or obvious circumstances, a reasonably prudent man might take. (Mullery v. Great Northern Ry. Co., 50 Mont. 408; Killeen v. Barnes-King Dev. Co., 46 Mont. 212; Johnson v. Maiette, 34 Mont. 477.)

If we take the appellant's evidence and measure Hall's choice of method by the light of the event, we may acknowledge that his judgment was at fault. But the true test is, how did the matter appear or how should it have appeared to Hall? The appellant concedes that the engine and tender could not have been turned so as to get the aid of the "pilot" in thrusting aside any obstructions encountered, and the asserted superiority of the tender as a forefront is based upon its weight and the presence of a footboard nearer the track than the platform of the caboose. Mr. Smith testified that the tender without coal and with half a tank of water would weigh "about 40,000 pounds;" that the caboose would weigh "in the neighborhood of 31- or 32,000 pounds," that "the footboard would probably strike the animal first" in case of a collision, and—though but twelve inches wide and a few inches high—"should carry almost any animal along. I don't mean to say that it
201 would have a tendency to throw it out into the clear—that would all depend on where the animal was struck." In view of this testimony, it seems to us that instead of being obvious, the alleged superiority of the tender as a fore-front was largely a matter of opinion. But be this as it may, the record is silent as to Hall's knowledge concerning the relative weight of the tender and caboose as they then stood; it is not beyond controversy that the transportation of the caboose and engine by means of a "flying-switch" was clearly a safe or a safer proceeding; it does appear, however, that a train proceeding tender foremost may be derailed by cattle, that with the caboose ahead some lookout on the track was possible with the aid of fusees and command of the train in case an obstruction were met, could be maintained by means of the air control; that with the tender ahead, the lookout nearest the front would be in the cab, the tender's length away, aided by no headlight save a common lantern set against a reflector, and that on many previous occasions—one or more on this branch—the method employed had been pursued with safety and success. To hold, under all these circumstances, that the greater danger of the chosen method was or should have been so apparent that its selection was incompatible with ordinary prudence, is simply out of the question.

The other respect in which it is claimed that assumed risk appears, is "knowledge of his working conditions" by the decedent. The argument is that for various reasons he must have known the railway was unfenced, and that his own acts and utterances establish his appreciation of the danger from such condition. That Hall knew there was no fence is a permissible, though not a necessary, inference from the other facts in the case. The absence of the fence, however, was a passive condition—in itself harmless
202 and we altogether dissent from those decisions cited by appellant, which deduce assumption of risk from knowledge of that fact alone. It is as valid to say that Hall, if he knew there was no fence, may have believed that such condition was permitted by the company because in the exercise of due care it had seen no occasion to fence, as it is to say that he assumed all the risk which

might arise from the concurrence of that condition with other conditions, the existence of which, though known to the company, may not have been known to him. "To make a case of assumption of risk, it is not enough that the injured party knew of the thing from which harm might come; he must know and appreciate the danger from which he suffered." (Westlake v. Keating G. Min. Co., 48 Mont. 120; Osterholm v. Boston & Mont. etc. Co., 40 Mont. 508; O'Brien v. Corra-Rock Island Min. Co., 40 Mont. 212; McCabe v. Montana C. Ry. Co., 30 Mont. 323.) In connection with the want of a fence, the presence of cattle in the adjacent country, their ability and propensity to visit the track, the likelihood of encountering them, the fact that should they be encountered while the train was backing a derailment might result, were requisite to command a reasonable apprehension of danger; and under the rule just stated, it does not answer to say that by exercising reasonable care the decedent could have discovered these things. He was not required to discover them; they must have been known or plainly observable to him (Moyse v. Northern Pac. Ry. Co., supra); and as to this, the most that can be gathered from the evidence is that such may or may not have been the case. We do no forget that Rae, a witness for the appellant, testified that just before leaving Kila he was told
203 by the decedent to watch the air while the decedent would ride the platform with lighted fusees looking out for stock, and we consider that if the decedent said and did this, his apprehension of danger was established. On cross-examination, however, the witness modified Hall's alleged statement so as to read, "you look out for the air and I will look out for the stock," believing that Hall would naturally ride the platform in looking out for stock; no one else heard this conversation; as a matter of fact, Rae did not take charge of the air, and neither he nor anyone else testifies that Hall went out on the platform or looked for stock. Moreover, this witness had within ten days of the accident made an affidavit concerning the matter, but he does not know whether he then "said anything about this talk with Hall" or when he first mentioned it to anyone. These circumstances, coupled with the inability of Hall to confirm or contradict the witness, and with the fact that his demeanor on the stand may have created an adverse opinion of his credibility, requires us to say that the truth of his statement was a question for the jury.

4. The procedural errors which it is contended require a new trial, have all been duly considered but we do not feel that any of them merit discussion, save the refusal of appellant's proposed instruction 13. This request involved a proposition of law upon which the appellant was entitled to have the jury correctly instructed, viz: the assumption of risk based upon the choice of ways. But the court cannot be put in error for refusing it, because it permits the decedent's choice of ways to be judged in the light of the event and does not indicate that the choice, to be assailable, must have been
204 of a method obviously dangerous, or obviously more dangerous than its alternative.

Finding no reversible error in the record, the judgment and order appealed from are affirmed.

Affirmed.

SYDNEY SANNER,
Associate Justice.

We concur:

THEO. BRANTLY,
Chief Justice.

WM. L. HOLLOWAY,
Associate Justice.

205 In the Supreme Court of the State of Montana.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Petition for Writ of Error.

Now comes your petitioner Great Northern Railway Company, and respectfully represents that in the above entitled cause or proceeding, as also in the rendition of the judgment of a plea therein, there was drawn in question the validity of an authority exercised under the laws of the United States and the decision was against such validity, and there was drawn in question the validity of a statute of or an authority exercised under the State of Montana, on the ground of their being repugnant to the laws of the United States, and the decision was in favor of such their validity, and there was drawn in question the construction of a statute of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such statute, and in said cause a manifest error hath happened to the great damage of said Great Northern Railway Company, Plaintiff in Error, and its great injury.

Your petitioner further respectfully represents that this cause was initiated by the plaintiff filing a complaint in the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, wherein and whereby the plaintiff sought to recover damages, under an act of the Congress of the United States, entitled "An act relating to the liability of common carriers by railroad to their employes in certain cases," (35 Stat. 65), com-

206 monly called the Federal Railroad Employers' Liability Act, said to have been sustained by the heirs of the deceased John P. Hall, whose death was alleged to have been caused by the alleged wrongful neglect of the Plaintiff in Error Great Northern Railway Company. That in said complaint the plaintiff charged that the said Plaintiff in Error (defendant below, and appellant in the Supreme Court of Montana) was engaged in interstate commerce, and that the said deceased was employed by defendant in such commerce, and the plaintiff sought to maintain said action under said Federal

Railroad Employers' Liability Act. That at the trial of said cause the proof showed that said deceased was not employed in interstate commerce, or in any commerce whatsoever, and upon the close of the plaintiff's testimony, as also upon the close of all of the testimony in the case, the defendant moved the court for a judgment of non-suit and for a judgment of dismissal upon the ground, in part, of the variance aforesaid, and contended that the variance was also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the Federal Court, whereas if the cause made by the proof had been alleged, to-wit, an intrastate case, the cause could have been removed, and hence a refusal to recognize the variance would operate to deny to the defendant Great Northern Railway Company a right, under a statute or law of the United States, to-wit: the right to remove such a cause properly pleaded to the Federal Court, and a refusal to recognize such a variance would permit the plaintiff to allege a cause of action under the laws of one sovereignty, to-wit, the United States, and to maintain or seek to prove a cause of action under the laws of another sovereignty, to-wit, the State of Montana. That notwithstanding said objection and motion the plaintiff contended before said trial court that the cause of action alleged in said complaint under said Federal Railroad Employers' Liability Law had been proved, and thereupon the court overruled said objection and motion, declined to sus-
207 tain the same, or to require or allow the plaintiff to amend his complaint by striking therefrom the allegations in regard to interstate commerce, or otherwise amending his complaint so as to plead a case of intrastate commerce and not of interstate commerce, and held that said cause was based upon said Federal Railroad Employers' Liability Law, and that said cause as so based had been established by the proof, and thereupon said trial court submitted said cause to the jury on the basis of said Federal Railroad Employers' Liability Law, and of the liability thereby created, and on the basis that said cause as pleaded and proved made a case for the jury under said law.

Your petitioner further respectfully represents that after judgment was rendered in said cause against said Great Northern Railway Company, an appeal was duly taken to the Supreme Court of the State of Montana, and thereupon said Supreme Court of the State of Montana rendered its judgment herein on the 20th day of January, A. D. 1916, affirming said judgment of said District Court. That in its said judgment and accompanying opinion affirming said judgment of said trial court the Supreme Court of the State of Montana adjudged that said deceased was not employed by defendant Great Northern Railway Company in interstate commerce, and that said cause as pleaded varied from said cause as proved, but that, notwithstanding the plaintiff had expressly alleged that said cause arose under said Federal Railroad Employers' Liability Law, and notwithstanding that the plaintiff alleged that the deceased was employed in interstate commerce, and notwithstanding the premises,

recovery could be had under the laws of the State of Montana, and that it was not error in said District Court to overrule said objections and motion of the defendant Great Northern Railway Company, setting forth said variance, and that said variance was not material except as affecting the right of the defendant to remove said cause to the United States Court, and that, notwithstanding the fact that said complaint alleged an interstate case, and that the plain-
208 tiff insisted that he had proved an interstate case, and, notwithstanding the fact that the court upheld these contentions and ruled that said cause was pleaded and proved to be an interstate case, the defendant should have then filed its petition for the removal of said cause to the United States courts, and that, not having done so, the defendant waived said right.

Your petitioner further respectfully represents that said cause was alleged to have been brought under said Federal Railroad Employers' Liability Act, and it was alleged in the complaint that the deceased was engaged in interstate commerce, and said allegations have at no time been amended, and said cause was tried in the trial court and submitted to the jury on the basis of said allegations having been proved by the plaintiff and on the basis of said cause arising under said law and under no other law, but in the Supreme Court of the State of Montana the plaintiff was permitted to change his said position, and to deny that said cause arose, or was submitted, under said Federal Law, and was permitted by said Supreme Court to contend that said judgment should be affirmed on the basis that liability might have been determined to exist under the laws of the State of Montana, and thus in said cause judgment was rendered in said trial court upon a cause of action alleged, but not proved, and in said Supreme Court said judgment was affirmed upon the basis that the plaintiff was entitled to recover upon a cause of action proved, but not alleged, though defendant at all times insisted upon said variance, and upon its right to have the plaintiff allege a cause of action under which he sought to recover, and to have said cause, when so alleged, removed to the United States court, and thereby, by permitting the plaintiff to allege a cause of action under said Federal Railroad Employers' Liability Law, not removable to the United States Court, and thereafter to recover in the Supreme Court of said State, without amendment, upon the basis of liability under the laws of the State of Montana, and not under said Federal Law, the defendant has been deprived of an opportunity
209–212 to file a petition for the removal of said cause to the United States courts, and of its right to remove said cause, properly pleaded, to the United States courts.

Wherefore, your petitioner Great Northern Railway Company, as Plaintiff in Error, Appellant in the Supreme Court of the State of Montana, and Defendant in the trial court, prays that a writ of error may issue to remove said cause and the record thereof into the Supreme Court of the United States, and to bring up for review before said Supreme Court the judgment of the Supreme Court of Montana, affirming said judgment of said trial court, to the end that

the error, if any hath happened, may be duly corrected, and full and speedy justice done your petitioner.

And your petitioner, as in duty bound, will ever pray.

E. C. LINDLEY,
NOFFSINGER & WALCHLI AND
VEASEY & VEASEY,
J. PARKER VEASEY AND
J. PARKER VEASEY, JR.,
Attorneys for Great Northern Railway Company,
Petitioner, Plaintiff in Error.

3574. In the Supreme Court of the State of Montana. J. C. Alexander, Admrn. of the Estate of John P. Hall, Deceased, Respondent, vs. Great Northern Railway Company, Appellant. Petition for Writ of Error. Filed: January 31, 1916. J. T. Carroll, Clerk of the Supreme Court of the State of Montana.

213 In the Supreme Court of the State of Montana.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Order.

This cause coming on this day further to be heard upon the petition of the Great Northern Railway Company for the allowance of a writ of error herein from the Supreme Court of the United States to have reviewed by said Supreme Court of the United States the judgment of the Supreme Court of the State of Montana, rendered herein; in consideration whereof:

It is hereby ordered that said writ of error issue as prayed for in the petition of said Great Northern Railway Company, filed with the Clerk of this court, and said writ of error is hereby allowed upon said petitioner filing with the Clerk of this court a good and sufficient bond, duly approved, in the sum of Twenty Thousand Dollars ($20,000), conditioned that the said Railway Company, as Plaintiff in Error, shall prosecute its writ to effect and answer all damages and costs, if it fail to make its plea good.

It is further ordered that said bond, when filed and approved, shall operate as a supersedeas, and that execution upon the judgment of said District Court for Flathead County shall be, and the same hereby is, stayed, and that the remittitur from the Supreme Court of the State of Montana in said cause to said District Court be held, pending the decision on said writ of error by said Supreme Court of the United States.

THEO. BRANTLY,
Chief Justice of the Supreme Court
of the State of Montana.

Dated January 31, A. D. 1916.

214 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana before you, or some of you, being the highest court of law or equity of the said State of Montana, in which a decision could be had in a suit between J. C. Alexander, Administrator of the Estate of John P. Hall, deceased, Defendant in Error (respondent in said Supreme Court of the State of Montana, plaintiff in the trial court) and Great Northern Railway Company, Plaintiff in Error (appellant in said Supreme Court of the State of Montana, defendant in the trial court), wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of Montana, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or of a statute of, or commission held under, the United States, and the decision was against such title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Great Northern Railway Company, as by its petition for a writ of error and its assignment of errors accompanying the same appears:

We, being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the
215 parties aforesaid, in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at the City of Washington in the District of Columbia, on the 31st day of March, 1916, at a session of said court to be then and there held, to the end that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 31st day of January in the year of our Lord one thousand nine hundred and sixteen, and the Independence of the United States the one hundred and fortieth.

[SEAL.] GEO. W. SPROULE,
Clerk of the United States District Court
for the District of Montana.

Let the foregoing Writ of Error issue.

THEO. BRANTLY,
Chief Justice of the Supreme Court
of the State of Montana.

216 [Endorsed:] In the Supreme Court of the United States. J. C. Alexander, Admr., Def. in Error, vs. G. N. Ry. Co., Pl. in Error. Writ of Error. Personal service of the within — this — day of ——, 191—, is hereby accepted and admitted. —— ——, Attorney for —— ——.

217 In the Supreme Court of the State of Montana.

J. C. ALEXANDER, as Administrator of the Estate of John P. Hall, Deceased, Plaintiff and Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Defendant and Appellant.

Bond on Writ of Error.

Know all men by these presents: That Great Northern Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Minnesota, as principal, and National Surety Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York (which has the capital and assets provided for in an Act of the Sixth Legislative Assembly of the State of Montana entitled "An Act to permit foreign Surety Companies to do business in this State and regulating the method thereof," for the purpose, among other things, of transacting business as a surety on Undertakings of persons and corporations, and which has complied with all the provisions of said Act and all acts amendatory thereof and supplemental thereto,) as surety, are held, and firmly bound unto the defendant in error, J. C. Alexander, as Administrator of the Estate of John P. Hall, Deceased, (Respondent in the Supreme Court of the State of Montana and Plaintiff in the District Court of Flathead County, Montana) in the penal sum of Twenty Thousand ($20,000) Dollars, for the payment of which amount, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Dated this 31st day of January, 1916.

218 The condition of the foregoing obligation is such that: Whereas, the above named Great Northern Railway Company, plaintiff in error (Appellant in the Supreme Court for Flathead County, Montana), has obtained or is about to obtain, a Writ of Error and Citation, directed to the said J. C. Alexander, as Administrator as aforesaid, defendant in error, citing and admonishing the said J. C. Alexander to be and appear in the Supreme Court of the United States within sixty days from the date thereof to show cause, if any there be, why the judgment rendered by the Supreme

Court of the State of Montana, in the above entitled action or proceeding, should not be reversed:

Now, therefore, if the said Great Northern Railway Company, plaintiff in error, shall prosecute the said Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be null and void; otherwise it shall remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY,
By VEASEY & VEASEY,
Its Attorneys for the State of Montana.

[SEAL.] NATIONAL SURETY COMPANY,
By W. S. FRARY,
Its Attorney-in-Fact.

The foregoing bond and surety are hereby approved this 31 day of January, A. D. 1916, and the same are hereby accepted as a supersedeas.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

Attested as to approval and approved by

[SEAL.] J. T. CARROLL,
Clerk of the Supreme Court of the State of Montana.

219 In the Supreme Court of the State of Montana.

No. 3574.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Respondent,
vs.
GREAT NORTHERN RAILWAY COMPANY, Appellant.

Assignment of Errors.

Messrs. Noffsinger & Walchli and Veazey & Veazey, Counsel for Appellant.

Filed January 13, 1915.
JOHN T. ATHEY, *Clerk.*

220 In the Supreme Court of the State of Montana.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Assignment of Errors upon Appeal to the Supreme Court of Montana.

Comes now Great Northern Railway Company, the appellant in the above entitled cause, defendant in the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, and files the following assignment of errors upon which it will rely upon the appeal taken by it to have
221 reviewed by the Supreme Court of the State of Montana the judgment made and entered in the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, in an action therein, entitled J. C. Alexander, Administrator of the Estate of John P. Hall, deceased, Plaintiff, vs. Great Northern Railway Company, a corporation, Defendant, on the 8th day of December, A. D. 1913, wherein and whereby the plaintiff, upon a verdict of a jury, was awarded the principal sum of Fifteen thousand dollars ($15,000) damages, and said appellant, defendant below, says that in the record and proceedings in said cause there is manifest error in this, to-wit:

Specifications Assigning Errors on Federal Questions and on the Final Disposition to be Made of the Cause.

I.

It was error in the court to overrule the demurrer of the defendant Great Northern Railway Company to the complaint of the plaintiff (Tr. p. 7).

II.

The complaint does not state facts sufficient to constitute a cause of action.

222 III.

It was error in the court to refuse requested instruction numbered IA of the defendant Great Northern Railway Company, as follows (Tr. p. 177):

"IA. You are instructed to return a verdict for the defendant.

IV.

It was error in the court to overrule the motion of the defendant Great Northern Railway Company for a judgment of non-suit and dismissal, upon the plaintiff's testimony, as follows (Tr. p. 82-87):

"Comes now the defendant in the above entitled cause and, at the close of the plaintiff's testimony and when all of the testimony of the plaintiff had been adduced, and moves the court for a judgment of non-suit and dismissal upon the merits, upon the testimony aforesaid, upon the following grounds:

First. That the testimony adduced by the plaintiff does not constitute facts sufficient to constitute a cause of action.

Second. That the testimony adduced by the plaintiff does not show the violation by defendant of any legal duty owing to plaintiff's intestate.

Third. It appears from the complaint that this action is based upon the federal statute defining the liability of railroads for injuries to, or deaths of, employees by reason of negligence, and the question as to the meaning of "negligence," under this statute, and as used in this statute, is necessarily a federal question; that
223 the sole ground of negligence charged is a failure to fence the railroad track in question, and this question, therefore, as to whether any duty was owing to plaintiff's intestate to fence the track under the case as made in the complaint, must be determined as a question of federal law aside from any statute of the State of Montana; and, under all the federal decisions and under the federal law, there is no duty owing to an employee to fence the track; and hence, there being no federal or other duty, there can be no liability under the federal statute, in the case as framed by the pleadings. As regards the Montana, so-called, fence statutes, they did not impose an absolute duty to fence, and, by their terms and by their restrictions, contained in the titles to the legislative acts of Montana, the duty to fence is not one which inures to the benefit of employees, or for a violation of which a cause of action can arise in favor of an employee, or his administrator, to recover damages by reason of his injuries or death; and such statutes, moreover, can have no bearing in an action brought under said federal law.

Fourth. It appears from the complaint that the sole ground of negligence charged is a failure to fence the railroad track in question. By the common law, there was no duty resting upon defendant in favor of plaintiff's intestate to fence its track; and, under the statutes of Montana, the original code did not create any duty to fence, but merely provided what fences should be erected by railroad companies if they did fence, and left the option with the adjoining farm owners to determine whether there should be a fence, and did not embody any obligation except in the case of adjoining farm owners, only, who owned farms immediately adjoining the railroad track; and subsequent amendments by legislative enactment,
224 by reason of the titles of such acts being limited to liability for stock killed, cannot create a duty to an employee or the liability of the death of plaintiff's intestate, the title to such acts being insufficient to cover the case of damage to persons, or any damage or liability other than damage or liability for stock. Hence, as there was no legal duty owing to plaintiff's intestate, there cannot, in any event, be any negligence.

Fifth. There is a fatal variance, amounting to a failure of proof,

between the allegations of plaintiff's complaint and the proof, which variance amounts also to a failure of proof in that it appears from the complaint that this action is based upon the statute of the United States defining liability of railroads, while engaged in interstate commerce, to its employees, or their families while such employees are employed in such commerce; and it is alleged in the complaint that at the time plaintiff's intestate was killed, defendant was engaged in interstate commerce, and that he was employed by defendant in such commerce; but the proof adduced by the plaintiff does not show or tend to show these allegations to be true; and, on the contrary, shows that according to the plaintiff's proof, the defendant was not at the time engaged in interstate commerce; that plaintiff's intestate also was not employed in such commerce, but that at said time defendant was engaged only in intrastate commerce, if any commerce, and that plaintiff's intestate was employed, if in any commerce, only in intrastate commerce. The proof shows that the only work being done by the deceased was the loading of ties left on the right of way by contractors who had cut the same in the neighboring hills, and that these ties, as raw material, were to be sent
225 to the tie-treating plant at Somers, where the raw material was to be treated and manufactured into the finished product or tie, which finished product might or might not thereafter be used in commerce, interstate or otherwise, by defendant or anyone else, and especially that the same might be used only in the construction of new lines not owned or operated by defendant, and in fact not in operation, but owned or being constructed by different companies other than the defendant. The work done by plaintiff's intestate was not in any way connected with any commerce, but was at most preparatory to, or anterior to, commerce later to be undertaken. The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the federal court, whereas, if the cause made by the proof had been alleged, to-wit, an intrastate case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to the defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the federal court, and a refusal to recognize such a variance permits the plaintiff to allege a cause of action under the laws of one sovereignty, to-wit, the United States, and to maintain or seek to prove a cause of action under the laws of another sovereignty, to-wit, the State of Montana.

This motion is based upon the complaint of the plaintiff and the records and files in this cause, and upon the testimony aforesaid.

V.

It was error in the court to overrule the motion of the de-
226 fendant Great Northern Railway Company for a judgment of dismissal at the close of all of the evidence in the cause, as follows (Tr. p. 149-155):

"Comes now the defendant in the above entitled cause and at the close of all of the evidence in the case and when all the testimony in the case had been adduced, and moves the court for a judgment of dismissal upon the merits upon the testimony aforesaid, upon the following grounds:

First. That the testimony adduced in the case does not constitute facts sufficient to constitute a cause of action.

Second. That the testimony adduced in the case does not show the violation by defendant of any legal duty owing to plaintiff's intestate.

Third. It appears from the complaint that this action is based upon the federal statute defining the liability of railroads for injuries to, or deaths of employees by reason of negligence, and the question as to the meaning of "negligence" under this statute, and as used in this statute is necessarily a federal question; that the sole ground of negligence charged is a failure to fence the railroad track in question, and this question, therefore, as to whether any duty was owing to plaintiff's intestate to fence the track under the case as made in the complaint, must be determined as a matter of federal law aside from any statute of the State of Montana; and under all the federal decisions, and under the federal law there is no duty owing to an employee to fence the track; and hence, there being no federal or other duty, there can be no liability under the federal statute, or in the case as framed by the pleadings. As regards the Montana, so-called, fence statutes, they did not impose an absolute duty to fence, and by their terms, and by their restrictions,
227 contained in the titles to the legislative acts of Montana, the duty to fence is not one which inures to the benefit of employees, or for a violation of which a cause of action can arise in favor of an employee, or his administrator, to recover damages by reason of his injuries or death; and such statutes, moreover, can have no bearing in an action brought under said federal law.

Fourth. It appears from the complaint that the sole ground of negligence charged is a failure to fence the railroad track in question. By the common law, there was no duty resting upon defendant in favor of plaintiff's intestate to fence its track, and under the statutes of Montana, the original code did not create any duty to fence, but merely provided what fences should be erected by railroad companies if they did fence, and left the option with the adjoining farm owners to determine whether there should be a fence, and did not embody any obligation except in the case of adjoining farm owners, only, who owned farms immediately adjoining the railroad track; and subsequent amendments by legislative enactment, by reason of the titles of such acts being limited to liability for stock killed, can not create a duty to an employee or liability for the death of plaintiff's intestate, the title to such acts being insufficient to cover the case of damage to persons, or any demage or liability other than damage to or liability for stock. Hence, as there is no legal duty owing to plaintiff's intestate, there can not, in any event, be any negligence.

Fifth. There is a fatal variance amounting to a failure of proof

between the allegations of plaintiff's complaint, and the proof, which variance amounts also to a failure of proof, in that it appears from the complaint that this action is based upon the statute of the United States defining liability of railroads, while engaged
228 in interstate commerce, to its employes, or their families, while such employees are employed in such commerce; and it is alleged in the complaint that at the time plaintiff's interstate was killed, defendant was engaged in interstate commerce, and that he was employed by defendant in such commerce; but the proof adduced in the case does not show or tend to show these allegations to be true; and, on the contrary, shows that according to the proof, the defendant was not at the time engaged in interstate commerce; that plaintiff's intestate, also, was not employed in such commerce, but that at said time defendant was engaged only in intrastate commerce, if in any commerce, and that plaintiff's intestate was employed, if in any commerce, only in intrastate commerce. The proof shows that the only work being done by the deceased was the loading of ties left on the right of way by contractors who had cut the same in the neighboring hills, and that these ties, as raw material, were to be sent to the tie-treating plant at Somers, where raw material was to be treated and manufactured into the finished product or tie, which finished product might or might not thereafter be used in commerce, interstate or otherwise, by defendant or anyone else, and especially that the same might be used only in the construction of new lines not owned or operated by defendant, and in fact not in operation, but owned or being constructed by different companies other than the defendant. The work done by plaintiff's intestate was not in any way connected with any commerce, but was at most preparatory to, or anterior to commerce later to be undertaken. The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the federal
229 court, whereas, if the cause made by the proof had been alleged, to-wit, an intrastate case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the federal court, and a refusal to recognize such a variance permits the plaintiff to allege a cause of action under the laws of one sovereignty, to-wit, the United States, and to maintain or seek or prove a cause of action under the laws of another sovereignty, to-wit, the State of Montana.

Sixth. It appears from the uncontradicted evidence in the case that even if the defendant was, under the court's ruling, in any respect negligent in any of the matters complained of in the complaint, or in the matter of not fencing the track, this condition of the track, and the dangers, if any, incident thereto, should have been known to the plaintiff's intestate, and in fact actually were known to him; and upon the further ground that at the time he was injured he was backing his train, whereas, if he had, in accordance

with proper railroad operation, according to the testimony, placed the engine at the head of his train, as the train moved toward Kalispell, the accident would have been avoided, and that he had, according to the testimony, a safe way of proceeding, to-wit, by placing his engine at the east end of his train; and that therefore he assumed the risk of the conditions of which complaint is made in regard to the matter of fences, and in regard to the danger to be encountered from striking animals, and because of his choice of a dangerous, or at least more dangerous method of proceeding; it appears from the uncontradicted testimony that the work done by Mr. Hall lasted for at least some five days, from October 7th
230 to October 11th, and that all the work which he did was done in broad daylight, and that in doing this work he was not simply running over the line from time to time, but most of the time his train was standing still, and it would be impossible under these circumstances and under other circumstances disclosed by the evidence for him not to have observed the lack of fencing and the dangers, if any, which confronted him. And moreover the testimony is uncontradicted that this entire line west of Glacier Park Station is practically unfenced, and that he did much work for many years up on the main line, so that beyond question he knew of the unfenced condition of the line and therefore assumed the risk.

This motion is based upon the complaint of the plaintiff and the records and files in this cause, and upon all of the testimony in the case.

VI.

It was error in the court to refuse the requested instruction of the defendant Great Northern Railway Company numbered 1B as follows (Tr. p. 177):

"1B. You are instructed that under the uncontradicted evidence in this case the deceased was not at the time of his injury employed by defendant in interstate commerce."

VII.

It was error in the court to rule and hold that, under the evidence in this cause, the deceased was, at the time of his injury, employed by the plaintiff in interstate commerce, and to submit the cause to the jury on the basis of that fact existing.

231 VIII.

It was error in the court to refuse the requested instruction numbered 1C of the defendant Great Northern Railway Company as follows (Tr. p. 177-178):

"1C. You are instructed that under the uncontradicted evidence in this case the defendant in operating the train which was derailed and in doing the work which the deceased and his associates were doing was not engaged in interstate commerce."

IX.

It was error in the court to rule and hold that, under the evidence in this cause the defendant, in operating the train which was derailed, and in doing the work which the deceased and his associates were doing, was engaged in interstate commerce, and to submit said cause to the jury upon the basis of that fact existing.

X.

It was error in the court to rule and hold that, under the evidence in this cause the deceased was, at the time of his injury, employed by the defendant in interstate commerce, and that the defendant at said time, in operating the train which was derailed, and in doing the work which the deceased and his associates were doing, was engaged in interstate commerce and that this action could be maintained under the federal statute defining the liability of railroads,
while engaged in interstate commerce, to their employees or
232 their families, for injuries to or death of employees, while such employees are engaged in such commerce.

XI.

It was error in the court to rule and hold that this action could be maintained under the Federal Statute defining the liability of railroads while engaged in interstate commerce to their employes or their families for injuries to or death of such employees while such employees are engaged in such commerce.

XII.

It was error in the court to refuse requested instruction numbered 9 of the defendant Great Northern Railway Company as follows (Tr. p. 178):

"9. There is no law in Montana which requires a railroad company, for the benefit or protection of its employes on any train, to fence its track to prevent cattle from straying upon its track, or otherwise, and a railroad company operating in Montana is not liable for injuries sustained by an employe, or for his death, from a derailment caused by collision with stock that had strayed upon the track because it had not been fenced against them."

XIII.

It was error in the court to refuse requested instruction numbered
13 of the defendant Great Northern Railway Company as
233 follows (Tr. p. 178-179):

"13. You are instructed that if the plaintiff's intestate had two or more ways of proceeding, one of which was dangerous and the other safe or less dangerous, and he voluntarily and unnecessarily and without there being any emergency, chose the dangerous or more dangerous way, and his death would not have occurred had

he chosen the safe or less dangerous way, then he assumed the risk of the choice of ways so voluntarily made."

XIV.

It was error in the court to give its instruction numbered 12 as follows (Tr. p. 167):

"12. You are instructed that if the defendant company, in the present case, in the exercise of reasonable care, knew that the track in question was not fenced, and likewise knew, or in the exercise of reasonable care could have ascertained that the track in question run through a portion of country where cattle were in such numbers and in such proximity to the track that they were likely to get upon the track because of the absence of a fence, if you find such to be the case, and the company likewise knew, or in the exercise of reasonable care could have ascertained that the cattle so getting upon the track were likely to cause the derailment of trains, and the company knew, or, in the exercise of reasonable care, could have ascertained that the cattle in question by the construction of a fence would be prevented from getting upon the track, and the derailment of trains would, by reason of that fact, be avoided, and knowing all of these facts the company neglected to construct a fence, and you further find, by reason of the absence of the fence on the occasion in question, a cow got upon the track and caused the
234 derailment of the train, and by reason of such derailment Mr. Hall suffered the injuries which resulted in his death, then the company, under the circumstances, would be responsible for the damages which Mr. Hall's death has occasioned."

XV.

It was error in the court to overrule the objection of the defendant Great Northern Railway Company to the court's said instruction numbered 12, as follows (Tr. p. 168-170):

"The foregoing instruction No. 12 was requested by the plaintiff and, upon the settlement of the instructions as aforesaid, the said defendant Great Northern Railway Company duly objected and excepted to said instruction, on the ground that it assumes as a fact that cattle were in such numbers there and in such close proximity to the track that they were likely to get upon the track because of the absence of the fence, and it assumes that cattle were likely to get upon the track, and assumes as a fact that the company in the exercise of reasonable care could have ascertained that the cattle so getting upon the track were likely to cause the derailment of trains, and it assumes as a fact that the cattle in question by the construction of a fence would be prevented from getting on the track and that thereby the derailment of trains would be avoided, and it assumes as a fact that cattle on the track would cause the derailment of trains. Said defendant, as aforesaid, further objected and excepted to said instruction on the ground that it does not draw the distinction between trains backing and trains running ahead in the ordinary

manner, and on the ground that it imposes a positive liability upon the defendant upon the facts stated, irrespective of whether or not, under the facts stated, the average reasonably prudent person
235 would ordinarily have fenced the line; in other words, said instruction advises the jury that, under those facts assumed in the instruction to exist, the average reasonably prudent person would fence the line, and the court thereby determines for itself—for the jury—what the average reasonably prudent person would have done under those circumstances, whereas, under the other instructions to be given by the court, defining what is negligence, the court advises the jury that it is for the jury to determine under all the facts in the case what the average reasonably prudent person would have done. Said defendant also, as aforesaid, duly objected and excepted to said instruction on the further ground that it submits to the jury the question as to whether there was a duty to fence at common law, whereas, under all the federal decisions and under the federal law and under every law and the common law, there is and was no duty owing to the plaintiff's intestate to fence the track in question, and the failure to fence the track in question could not be a violation of a duty owing to him, and on the ground that there is no fact justifying the submission to the jury of any issue as to whether or not trains are liable to be derailed by striking stock, the uncontradicted evidence being to the effect that such derailments are very rare and that they are not likely to occur, and, under the federal law, under which the court has charged that this case is brought and under which the court has permitted this case to be brought, a failure to fence does not constitute negligence."

236 *Specifications Assigning Errors Relating to Rulings on the Evidence in the Course of the Trial.*

XVI.

It was error in the court to sustain the objection to the following question in the direct examination of the witness Thomas Rae, as a witness on the part of the defendant (Tr. p. 95):

"Q. What have you to say as to whether or not stock had been on the track in your different trips up and down the line?"

XVII.

It was error in the court to overrule the following offer of proof, made by the defendant in the direct examination of the witness Thomas Rae, as a witness on the part of the defendant (Tr. p. 95-96):

"We offer to prove by the witness now on the stand that they were looking for cattle, that the witness was looking out for cattle all the time that they operated on the Marion line, and that cattle had been seen at this place the day before, and were seen by him, this place being the place where the accident occurred, and that cattle were seen all along the line every day that they operated there."

XVIII.

It was error in the court to sustain the objection to the following question asked in the direct examination of William R. Smith as a witness on the part of the defendant (Tr. p. 106):

237 "Q. I will ask you, Mr. Smith, from your experience in railroading and as a conductor, whether a freight conductor, working on a work train, would know, from his duties, whether or not the line was fenced?"

XIX.

It was error in the court to sustain the objection to the following question asked in the direct examination of the witness William R. Smith, as a witness on the part of the defendant (Tr. p. 110):

"Q. In the regular course of business what does a conductor do in the operation of his train, especially with relation to when stock signals are sounded, or stops made on account of stock presumably on the track?"

XX.

It was error in the court to overrule the following offer of proof in the direct examination of the witness William R. Smith, as a witness on the part of the defendant (Tr. p. 111):

"We offer to prove that in the regular course, a conductor, on hearing a stock whistle blown, would perform the act of looking out and watching the stock on the right of way, and observe whether or not they escaped from the right of way, and whether they had any means of escaping from the right of way, and whether there was any obstruction to prevent them from escaping from the right of way."

XXI.

It was error in the court to sustain the objection to the

238 following question in the direct examination of the witness William R. Smith, as a witness on the part of the defendant (Tr. p. 112-113):

"Q. In your opinion as an expert railway man, I will ask you whether you consider it necessary to fence for the protection of employes?"

XXII.

It was error in the court to sustain the objection of the plaintiff to the following question asked in the direct examination of the witness William R. Smith, as a witness on the part of the defendant (Tr. p. 113):

"Q. Mr. Smith in your experience as a railroad man, and having in mind your familiarity with stock being struck on the right of way, and, taking also into consideration the movement of trains on the Marion Branch, state whether or not it was necessary to fence at the point, or within a mile of the point, in either direction, where this accident occurred."

XXIII.

It was error in the court to sustain the following motion of the plaintiff to strike out the following testimony of the witness William R. Smith, elicited upon the cross-examination of said witness by the plaintiff (Tr. p. 123-126):

"By Mr. Nolan: That is all.

"By the Witness: May it please the court, I could give you a little further information on that, and present proof as to eight oxen of the large size killed backing up without derailing the tank. Killing eight large oxen without ditching the tank. I can bring the proof for it.

239 Q. Well, was that under your personal observation?

A. No, sir, from my records, that is all. I can bring the proof, the witnesses.

Q. And on the Kalispell Division?

A. Yes, sir.

Q. The engine backing up?

A. Yes, sir.

Q. And going at what rate of speed?

A. I can't say that.

Q. What?

A. I couldn't say that now.

Q. What was the size of the engine?

A. Well, I couldn't say that. I couldn't say it myself, but I could bring proof of the fact to cover the report.

Q. Well, you haven't proof, now, to give us? Of course, you have different sized engines, haven't you, operating here?

A. Yes, sir, we have some large and some small.

Q. And on this Kalispell Division, across these mountains, you have engines that weigh how much?

A. Over five hundred thousand pounds.

Q. Including the tender?

A. Including the tender and coal bin.

Q. You don't know whether it was one of those engines or not that collided with the oxen that you have in mind?

A. Yes. It was a much lighter engine than that.

Q. Well, if it were much lighter you have in mind some engine, haven't you?

A. I have in mind the time and the year, and the class of engine we were running. We have just had three large engines the last year or two.

Q. When were these oxen killed?

240 A. That was several years ago when we were running the thirteen hundred engines here. I wasn't aware of the circumstances until today.

Q. Until today?

A. Yes, but we have the proof, the actual men that seen the derailment are still on the division.

By Mr. Nolan: I move to strike out the statements of this witness with reference to that, on the ground that it is information that he threw in.

By the Court: All the statements of the witness as cross examination starting with the testimony concerning the killing of eight head of stock, strike out.

By Mr. Veazey: Object to the testimony being stricken out on the ground that it was elicited by counsel for the plaintiff, and on finding that it was unsatisfactory, then for the first time, the motion was made to strike it out; and the motion to strike out the testimony is sustained by the court after the testimony has all gone in, and after counsel had previously waived any right to object to the testimony going in.

By the Court: As I understand it, there was no question before the court, no question of the witness, and after counsel for the plaintiff had stated that that was all on cross examination.

By Mr. Veazey: Counsel didn't ask to have it stricken out then, but proceeded with the examination.

By the Court: The examination continued until such time as it was shown to be hearsay evidence. The ruling will stand. Strike it out."

XXIV.

241 It was error in the court to sustain the following objection to the following question in the direct examination of the witness L. G. Dunning, as a witness on the part of the defendant (Tr. p. 126-127):

"Q. Will you state what those figures are?

By Mr. Nolan: We object to that as absolutely immaterial unless it is confined to this Marion Branch.

By Mr. Veazey: We are showing here that there have been no derailments, in spite of the fact that on the main line they are operating innumerable trains, as shown by the time table.

Which objection was by the court overruled.

Q. Will you state what that shows?

A. From January 1, 1911, to December 31, 1911, which would be a year, there were 329 animals killed, and from January 1, 1912, to December 31, 1912——

By Mr. Nolan: We object to that as immaterial. It is subsequent to this time of the accident in question.

Which objection was by the court sustained.

By Mr. Veazey: If the court please, it is showing that there is no danger in the operation of trains from killing live stock."

XXV.

It was error in the court to overrule the following offers of proof by the defendant in the direct examination of the witness L. G. Dunning (Tr. p. 127-128):

"Thereupon the defendant offered to prove by the witness on the stand that in the year 1912, on the Kalispell Division, there were 174 animals killed, but the court refused to receive the proof and denied the offer of proof, to which ruling of the court the
242 defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed."

"Thereupon the defendant offered to prove by the witness on the stand that in the year 1913, from January 1, 1913, to December 5, 1913, on the Kalispell Division, there were 145 animals killed, which offer of proof was by the court denied, and the court declined to receive said proof, to which ruling of the court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed."

XXVI.

It was error in the court to sustain the objection to the following question asked the witness L. G. Dunning in his direct examination as a witness on the part of the defendant, after he had testified that he had statistics as to the number of animals killed on the Marion Branch, to-wit (Tr. p. 128-129):

"Q. How many animals have been killed in that period on the Marion Branch?

Mr. Nolan: We object to that except previous to October 11, 1911, and then only for the purpose of showing the likelihood of this man knowing about the existence of cattle on the track.

Which said objection was by the court sustained and to which ruling of the court the defendant, by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

The Court: I take it that the testimony as to the number of animals killed or being on the track on the Marion Branch prior to the date of the accident might be competent to show whether or
243 not the company was negligent in failing to erect a fence, and whether or not they knew of the conditions there, and for the purpose of showing whether or not the decedent who was in their employ knew the conditions there up to the time of the accident, but I don't see that the inquiry since the date of the accident would serve any good purpose in this suit.

(By Mr. Veazey:)

Q. From January 1, to October 11, 1911, how many animals were killed on the Marion Branch?

A. There were two killed up to October 11, 1911. That includes the animal killed in this instance, on October 11, 1911."

XXVII.

It was error in the court to overrule the defendant's offer of proof in the direct examination of its witness, L. G. Dunning as follows (Tr. p. 129):

"By Mr. Veazey: We offer to prove by the witness now on the stand the number of animals killed on the Marion Line or Branch from January 1, 1912, to January 1, 1913, and from January 1, 1913, to the present time."

XXVIII.

It was error in the court to overrule the following offer of proof made by the defendant in the direct examination of its witness E. M. Campbell (Tr. p. 131):

"The defendant offered in evidence that portion of the time card showing the capacity of the passing track at Kila, but the plaintiff objected to the introduction of the same in evidence, for the reason that the same is hearsay evidence; which objection was by the court sustained."

244 Wherefore, the defendant prays that the judgment of said court should be reversed.

NOFFSINGER & WALCHLI AND
VEAZEY & VEAZEY,
Attorneys for Appellant.

245 In the Supreme Court of the State of Montana.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Respondent,

vs.

GREAT NORTHERN RAILWAY COMPANY, Appellant.

Assignment of Errors upon Writ of Error from the Supreme Court of the United States.

Comes now Great Northern Railway Company, plaintiff in error, upon a Writ of Error from the Supreme Court of the United States, Appellant in the Supreme Court of the State of Montana, and defendant in the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, and files the following assignment of errors, upon which it will rely upon the prosecution by it of a Writ of Error from the Supreme Court of the United States to have reviewed by said Supreme Court of the United States a judgment made and entered by the Supreme Court of the State of Montana on the 20th day of January, 1916, affirming a judgment made and entered in said District Court for Flathead County on the 8th day of December, 1913, in a cause in said District Court entitled J. C. Alexander, Administrator of the Estate of John P. Hall, Deceased, Plaintiff, vs. Great Northern Railway Company, Defendant, wherein and whereby the plaintiff, upon a verdict of the jury, was awarded the principal sum of Fifteen Thousand Dollars ($15,000) damages. And the said Great Northern Railway Company, as the plaintiff in error, appellant in said

Supreme Court and defendant in said District Court, says that in the record and proceedings, as also in said judgment of said Supreme Court in said cause there is manifest error in this, to-wit:

246 1. It was error in the court to hold that, though the complaint alleged that the defendant was engaged in interstate commerce, and that the plaintiff's intestate was at the time of his death employed by the defendant in such commerce, and the proof, on the contrary, did not sustain these allegations, and showed that the deceased was not employed in such commerce, and though this discrepancy between the allegations of the complaint and the proof constituted a variance, it was not a material variance.

2. It was error in the court to hold that on a variance arising between the allegations of the complaint, to the effect that the defendant was engaged in interstate commerce, and the plaintiff's intestate was employed by defendant in such commerce, and the proof that said intestate was not employed by defendant in such commerce, this variance was material only as affecting a right of defendant to remove said cause to the United States courts, and that, though the trial court held that the proof sustained the said allegations in regard to interstate commerce and submitted the same to the jury on the basis only of liability under the Federal Railroad Employers' Liability Law, the defendant could and should have filed a petition for the removal of said cause at the close of the evidence, and that, not having done so, it waived its right of removal.

3. It was error in the court to hold that, on the proof showing that the allegations of the complaint in regard to interstate commerce were disproved, the defendant could and should have filed a petition for the removal of said cause to the United States courts, though the complaint, as still submitted and framed by the plaintiff, and construed and upheld by the trial court, charged only a case under the Federal Railroad Employers' Liability Law, and although the plaintiff had not applied for leave to amend and had not amended the same, so as to allege only an intrastate case, and although the trial court submitted the case to the jury only under

247 the said Federal Law; and to hold that defendant, not having then filed such petition for removal with said cause in its said condition, waived its said right of removal.

4. It was error in the court to hold that while the complaint at plaintiff's instance, choice and insistence, and as construed and upheld by the trial court, charged that the case arose under the Federal Railroad Employers' Liability Law, the defendant, to sustain its contentions that the proof showed an intrastate case and no case under the said Federal Law, could and should have filed its petition for the removal of said cause to the United States courts during the trial of said cause, and not having done so, waived its right to remove said cause, although at the trial it insisted upon said variance, and plaintiff did not seek, and was not compelled to make, an amendment by striking out the allegations in regard to interstate commerce, or by alleging an intrastate case, and although the plaintiff and the trial court held that the proof did establish an interstate

case, and that the cause would be, and was submitted on the basis of the same arising only under the said Federal Law.

5. It was error in the court to hold that the defendant could and should have filed a petition for the removal of said cause to the United States courts, and that, not having done so, it waived said federal right.

6. It was error in the Supreme Court to hold that it was not error in the trial court to refuse to recognize the variance between the allegations of the complaint that the case was an interstate case, and the proof that it was an intrastate case, and to refuse to compel the plaintiff to amend to conform to the proof, and thereby enable the defendant to file a petition for the removal of said cause to the United States court, and, although said cause was alleged, tried and submitted in the trial court as an interstate case, to permit the plaintiff to change his position in the Supreme Court, repudiate his
248 and the trial court's assertions and ruling that it was an interstate case, and uphold the judgment in the trial court in the Supreme Court of the state, on the ground that the case made was an intrastate case.

7. It was error in the Supreme Court to hold that the defendant could, under the laws of the United States, have filed a petition for the removal of said cause to the United States courts as long as the allegations in regard to interstate commerce remained in the complaint, or that the defendant had a first, or any, opportunity to file a petition for the removal of said cause to the United States courts in said cause prior to a time when the plaintiff should amend the complaint therein by striking out the allegations in regard to interstate commerce.

8. It was error in the court to hold that, although the complaint alleged that the defendant was engaged in interstate commerce and plaintiff's intestate was employed in such commerce, while the proof showed that the plaintiff's intestate was not employed in such commerce, and although the defendant moved for a dismissal on the ground of this variance, and specifically asserted in said motion that a failure to recognize the variance and to sustain the motion would deprive the defendant of its rights to remove the cause to the United States courts, if properly pleaded to accord with the proof, and although the defendant at the trial, and in its said motion, insisted that, though the cause alleged arose under the Federal Railroad Employers' Liability Law, the case proved did not arise under said law, and although the plaintiff insisted that the case proved did arise under such law, and did accord with the case alleged, and although the trial court overruled the defendant's contentions and motion aforesaid, and sustained the plaintiff's said contentions and held that the case proved accorded with the case alleged, and arose only under the said Federal Law, and submitted said case to the jury solely under said Federal Law, and did not sustain defend-
249 ant's said motion with leave to the plaintiff to amend so as to strike out the disproved allegations in regard to interstate commerce, nevertheless the defendant could and should have filed its petition for a removal of said cause to the United States courts dur-

ing the trial of said cause, or at the conclusion thereof, and while said cause as pleaded and as upheld by the court was in the condition aforesaid, and not having done so, waived said right of removal.

9. The complaint does not state facts sufficient to constitute a cause of action under the Federal Railroad Employers' Liability Law.

10. It was error in the court to refuse the requested instruction numbered IA of the defendant Great Northern Railway Company, as follows:

"IA. You are instructed to return a verdict for the defendant."

11. It was error in the court to overrule the motion of the defendant Great Northern Railway Company for a judgment of nonsuit and dismissal upon the plaintiff's testimony.

12. It was error in the court to overrule the motion of the defendant Great Northern Railway Company for a judgment of dismissal at the close of all the evidence in the case, as follows:

"Comes now the defendant in the above entitled cause and at the close of all of the evidence in the case and when all the testimony in the case had been adduced, and moves the court for a judgment of dismissal upon the merits upon the testimony aforesaid, upon the following grounds:

"First. That the testimony adduced in the case does not constitute facts sufficient to constitute a cause of action.

"Second. That the testimony adduced in the case does not show the violation by defendant of any legal duty owing to plaintiff's intestate.

"Third. It appears from the complaint that this action is based upon the federal statute defining the liability of railroads for injuries to, or deaths of employees by reason of negligence, and the question as to the meaning of 'negligence' under this statute, and as used in this statute is necessarily a federal question; that the sole ground of negligence charged is a failure to fence the railroad track in question, and this question, therefore, as to whether any duty was owing to plaintiff's intestate to fence the track under the case as made in the complaint, must be determined as a matter of
250 federal law aside from any statute of the State of Montana; and under all the federal decisions, and under the federal law there is no duty owing to an employee to fence the track; and hence, there being no federal or other duty, there can be no liability under the federal statute, or in the case as framed by the pleadings. As regards the Montana, so-called, fence statutes, they did not impose an absolute duty to fence, and by their terms, and by their restrictions, contained in the titles to the legislative acts of Montana, the duty to fence is not one which inures to the benefit of employees, or for a violation of which a cause of action can arise in favor of an employee, or his administrator, to recover damages by reason of his injuries, or death; and such statutes, moreover, can have no bearing in an action brought under said federal law.

Fourth. It appears from the complaint that the sole ground of negligence charged is a failure to fence the railroad track in question. By the common law, there was no duty resting upon defendant in

favor of plaintiff's intestate to fence its track, and under the statutes of Montana, the original code did not create any duty to fence, but merely provided what fences should be erected by railroad companies if they did fence, and left the option with the adjoining farm owners to determine whether there should be a fence, and did not embody any obligation except in the case of adjoining farm owners, only, who owned farms immediately adjoining the railroad track; and subsequent amendments by legislative enactment, by reason of the titles of such acts being limited to liability for stock killed, can not create a duty to an employee or liability for the death of plaintiff's intestate, the title to such acts being insufficient to cover the case of damage to persons, or any damage or liability other than damage to or liability for stock. Hence, as there is no legal duty owing to plaintiff's intestate, there can not, in any event, be any negligence.

Fifth. There is a fatal variance amounting to a failure of proof between the allegations of plaintiff's complaint, and the proof, which variance amounts also to a failure of proof, in that it appears from the complaint that this action is based upon the statute of the United States defining liability of railroads, while engaged in interstate commerce, to its employees, or their families, while such employees are employed in such commerce; and it is alleged in the complaint that at the time plaintiff's intestate was killed, defendant was engaged in interstate commerce, and that he was employed by defendant in such commerce; but the proof adduced in the case does not show or tend to show these allegations to be true, and, on the contrary, shows that according to the proof, the defendant was not at the time engaged in interstate commerce; that plaintiff's intestate, also, was not employed in such commerce, but that at said time defendant was engaged only in intrastate commerce, if in any commerce, and that plaintiff's intestate was employed, if in any commerce, only in intrastate commerce. The proof shows that the only work being done by the deceased was the loading of ties left on the right of way by contractors who had cut the same in the neighboring hills, and that these ties, as raw material, were to be sent to the tie-treating plant at Somers, where raw material was to be treated and manufactured into the finished product or tie, which finished product might or might not thereafter be used in commerce, interstate or otherwise, by defendant of anyone else, and especially that the same might be used only in the construction of new lines not owned or operated by defendant, and in fact not in operation, but owned or being constructed by different companies other than the defendant. The work done
251 by plaintiff's intestate was not in any way connected with any commerce, but was at most preparatory to, or anterior to commerce later to be undertaken. The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the federal court, whereas, if the cause made by the proof had been alleged, to-wit, an intrastate case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead

to the federal court, and a refusal to recognize such a variance permits the plaintiff to allege a cause of action under the laws of one sovereignty, to-wit, the United States, and to maintain or seek to prove a cause of action under the laws of another sovereignty, to-wit, the State of Montana.

Sixth. It appears from the uncontradicted evidence in the case that even if the defendant was, under the court's ruling, in any respect negligent in any of the matters complained of in the complaint, or in the matter of not fencing the track, this condition of the track, and the dangers, if any, incident thereto, should have been known to the plaintiff's intestate, and in fact actually were known to him; and upon the further ground that at the time he was injured he was backing his train, whereas, if he had, in accordance with proper railroad operation, according to the testimony, placed the engine at the head of his train, as the train moved toward Kalispell, the accident would have been avoided, and that he had, according to the testimony, a safe way of proceeding, to-wit, by placing his engine at the east end of his train; and that therefore he assumed the risk of the conditions of which complaint is made in regard to the matter of fences, and in regard to the danger to be encountered from striking animals, and because of his choice of a dangerous, or at least more dangerous method of proceeding; it appears from the uncontradicted testimony that the work done by Mr. Hall lasted for at least some five days, from October 7th to October 11th, and that all the work which he did was done in broad daylight, and that in doing this work he was not simply running over the line from time to time, but most of the time his train was standing still, and it would be impossible under these circumstances and under other circumstances disclosed by the evidence for him not to have observed the lack of fencing and the dangers, if any, which confronted him. And moreover the testimony is uncontradicted that this entire line west of Glacier Park Station is practically unfenced, and that he did much work for many years upon the main line, so that beyond question he knew of the unfenced condition of the line and therefore assumed the risk.

This motion is based upon the complaint of the plaintiff and the records and files in this cause, and upon all of the testimony in the case."

13. It was error in the Supreme Court to Hold that the trial court, in an action framed solely on the Federal Railroad Employers' Liability Law, could rule and hold that the action could be maintained under said Federal Law, and could submit the cause to the jury on that basis, and that thereafter, the Supreme Court of the State could deny liability under that law, and could hold that the cause as proved did not arise under such law, but permit recovery
252 under the state law, and on the basis of a cause proved as an intrastate case, though alleged as an interstate case.

14. It was error in the court to refuse requested instruction numbered 13 of the defendant Great Northern Railway Company, as follows:

"13. You are instructed that if the plaintiff's intestate had two or more ways of proceeding, one of which was dangerous and the other

safe or less dangerous, and he voluntarily and unnecessarily and without there being any emergency, chose the dangerous or more dangerous way, and his death would not have occurred had he chosen the safe or less dangerous way, then he assumed the risk of the choice of ways so voluntarily made."

15. It was error in the Supreme Court of the State to render its judgment affirming the judgment of the District Court.

16. It was error in the Supreme Court of the State to hold that a cause alleged to have been brought under the law of the United States, commonly called the Federal Railroad Employers' Liability Law, and authorized by the laws of the United States to be brought in the state courts, and submitted by the trial court to the jury solely on the basis of its having been brought under the laws of that sovereignty, to-wit, the United States, could in the Supreme Court of the State of Montana, be maintained, and the judgment below affirmed as a cause brought under the laws of another sovereignty, to-wit, the State of Montana, although the proof showed that the allegations of the complaint that the cause arose under the said federal Railroad Employers' Liability Law had been disproved, and although the defendant insisted upon this variance, and the trial court declined to recognize the same.

Wherefore, Great Northern Railway Company, the plaintiff in error aforesaid, prays that the judgment of said Supreme Court be reversed, and that said cause be remanded with directions to sustain said defendant's motion to dismiss, and to correct the errors hereinbefore assigned.

NOFFSINGER & WALCHLI AND
VEAZEY & VEAZEY,
Attorneys for Plaintiff in Error,
Appellant in the Supreme Court of the State of Montana.

253 *Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Montana before you, or some of you, being the highest court of law or equity of the said State of Montana, in which a decision could be had in a suit between J. C. Alexander, Administrator of the Estate of John P. Hall, deceased, Defendant in Error (respondent in said Supreme Court of the State of Montana, Plaintiff in the trial court) and Great Northern Railway Company, Plaintiff in Error (appellant in said Supreme Court of the State of Montana, defendant in the trial court), wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an

authority exercised under, said State of Montana, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or of a statute of, or commission held under, the United States, and the decision was against such title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Great Northern Railway Company, as by its petition for a writ of error and its assignment of errors accompanying the same appears:

We, being willing that such error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be
254 therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at the City of Washington in the District of Columbia, on the 31st day of March, 1916, at a session of said court to be then and there held, to the end that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 31st day of January in the year of our Lord one thousand nine hundred and sixteen, and the Independence of the United States the one hundred and fortieth.

[Seal United States District Court, District of Montana.]

GEO. W. SPROULE,
Clerk of the United States District Court
for the District of Montana.

Let the foregoing Writ of Error issue.

THEO. BRANTLY,
Chief Justice of the Supreme Court
of the State of Montana.

255 [Endorsed:] In the Supreme Court of the United States. J. C. Alexander, Adm'r, Defendant in Error, vs. Great Northern Railway Company, Plaintiff in Error. Writ of Error. Filed Jan. 31, 1916, and copy lodged on the same day for the adverse party. J. T. Carroll, Clerk of the Supreme Court of the State of Montana. Personal service of the within Writ of Error this 31st day of Jan'y, 1916, is hereby accepted and admitted. Walsh & Nolan & Kellar, Attorneys for Defendant in Error.

256 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to J. C. Alexander, Administrator of the Estate of John P. Hall, Deceased, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at a session thereof to be held in the City of Washington in the District of Columbia within sixty (60) days from the date hereof, pursuant to a writ of error under the seal of the United States District Court for the District of Montana, filed in the Clerk's office of said Supreme Court of the United States, wherein Great Northern Railway Company is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness, the Honorable Theodore Brantley, Chief Justice of the Supreme Court of the State of Montana this 31st day of January, in the year of our Lord one thousand nine hundred and sixteen.

THEO. BRANTLY,
Chief Justice of the Supreme Court of the State of Montana.

257 [Endorsed:] In the Supreme Court of the United States. J. C. Alexander, Adm'r, Defendant in Error, vs. Great Northern Railway Company, Plaintiff in Error. Citation on Writ of Error. Filed Jan. 31, 1916. J. T. Carroll, Clerk. Personal service of the within Citation this 31st day of January 1916 is hereby accepted and admitted. Walsh, Nolan & Scallon, Attorneys for Defendant in Error.

258 In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Defendant in Error.

Præcipe.

To the Clerk of the Supreme Court of the State of Montana:

In accordance with the Writ of Error heretofore sued out to have the judgment of the Supreme Court of the State of Montana rendered in a proceeding in said Supreme Court, entitled J. C. Alexander, as Administrator, as aforesaid, Respondent, vs. Great Northern Railway Company, Appellant, reviewed by the Supreme Court of the United States, in and by which said Writ of Error you are

directed to transmit a true copy of the record and of the assignment of errors and of all proceedings in the case under your hand and the seal of the Supreme Court of the State of Montana, the Plaintiff in Error, Great Northern Railway Company, does now, pursuant to the directions of Rule 8 of the Supreme Court of the United States, hereby request and direct that the following portions of the record be incorporated in the transcript of the record on such Writ of Error, to-wit:

1. The Transcript on Appeal filed by the appellant, Great Northern Railway Company on its appeal to the Supreme Court of the State of Montana from the judgment rendered by the District Court of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, in favor of the plaintiff, J. C. Alexander as Administrator, and against the said appellant, Great Northern Railway Company, as defendant, in said District Court, which said transcript was filed in said Supreme Court of the State of Montana on the 3 day of February, A. D. 1915.

2. The Assignment of Errors filed by the said Great North-
259 ern Railway Company in the Supreme Court of the State of Montana on the 13th day of January, A. D. 1915, being the assignment of errors upon which it relied in said Supreme Court of the State of Montana.

3. The judgment of the Supreme Court of the State of Montana affirming the judgment appealed from, which said judgment of the Supreme Court of the State of Montana was rendered on the 20th day of January, A. D. 1916.

4. The Opinion of the Supreme Court of the State of Montana, accompanying its said judgment of affirmance.

5. The Petition of Great Northern Railway Company for a Writ of Error to have said judgment of said Supreme Court of the State of Montana reviewed by the Supreme Court of the United States, and the Assignment of Errors which accompanied said petition, the said Petition and Assignment of Errors having been filed in said Supreme Court of the State of Montana on the 31st day of January, A. D. 1916.

6. The Order of the Chief Justice of said Court made on said 31st day of January, A. D. 1916, authorizing the issuance of said Writ of Error.

7. The bond filed by said Great Northern Railway Company on said Writ of Error and to act as a supersedeas.

8. The præcipe of the attorneys for the plaintiff in error Great Northern Railway Company filed with the undersigned, together with acknowledgment of service of a copy thereof on counsel for the defendant in error, indicating the portions of the record to be incorporated into the Transcript of the record on the Writ of Error hereinafter referred to.

9. Also the following original papers filed in your office on the 31st day of January, A. D. 1916, to-wit.

(1) The original Writ of Error sued out by said Great Northern Railway Company as plaintiff in error, pursuant to said order, together with the acknowledgment of the service thereof signed by

the plaintiff's attorneys, which said Writ of Error was sued out as aforesaid on the 31st day of January, A. D. 1916, and a copy thereof was lodged with the undersigned as such Clerk on said day for the adverse party in the case, entitled as aforesaid, J. C. Alex-
260 ander, Administrator of the Estate of John P. Hall, deceased, Respondent, vs. Great Northern Railway Company, Appellant.

(2) The original citation upon said Writ of Error with the acknowledgment of service thereof by the attorneys for the plaintiff, Respondent in this court.

E. C. LINDLEY,
St. Paul, Minn.;
VEAZEY & VEAZEY,
I. PARKER VEAZEY,
I. PARKER VEAZEY, JR.,
Great Falls, Montana,
Attorneys for Plaintiff in Error, Great Northern Railway Company.

Due personal service of the foregoing Præcipe admitted this 10 day of March, A. D. 1916.

WALSH, NOLAN & SCALLON,
T. J. WALSH,
C. B. NOLAN,
WM. SCALLON,
Attorneys for Defendant in Error, J. C. Alexander, Adm., Helena, Mont.

3574. J. C. Alexander, Adm., Respondent, v. Great Northern Ry. Co., Appellant. Præcipe. Filed March 10, 1916. J. T. Carroll, Clerk of Supreme Court of Montana.

261 STATE OF MONTANA,
County of Lewis and Clark, ss:

Office of the Clerk of the Supreme Court of Montana.

In obedience to the commands of the within Writ of Error, the undersigned, as Clerk of the Supreme Court of the State of Montana, being the court to which the said Writ of Error is directed, does hereby make return of the same by transmitting herewith a true copy of the record and of the Assignment of Errors and of all proceedings in the case in said Writ of Error referred to, under the hand of the undersigned and under the seal of said Court, the said true copy of the record and of the assignment of errors and of the proceedings aforesaid being the foregoing transcript, and I do hereby certify that the foregoing transcript sets forth and contains full, true and correct copies of the following papers on file in my office, towit:

1. The transcript on appeal filed by the appellant, Great Northern Railway Company on its appeal to the Supreme Court of the State of Montana from the judgment rendered by the District Court

of the Eleventh Judicial District of the State of Montana, in and for the County of Flathead, in favor of the plaintiff, J. C. Alexander as Administrator, and against the said appellant, Great Northern Railway Company, as defendant in said District Court, which said transcript was filed in the said Supreme Court of the State of Montana on the — day of November, A. D. 1914.

2. The Assignment of Errors filed by the said Great Northern Railway Company in the Supreme Court of the State of Montana on the 13th day of January, A. D. 1915, being the assignment of errors upon which it relied in said Supreme Court of the State of Montana.

3. The judgment of the Supreme Court of the State of Montana affirming the judgment appealed from, which said judgment of the Supreme Court of the State of Montana was rendered on the 20th day of January, A. D. 1916.

4. The Opinion of the Supreme Court of the State of Montana, accompanying its said judgment of affirmance.

5. The Petition of Great Northern Railway Company for
262 a Writ of Error to have said judgment of said Supreme Court of the State of Montana reviewed by the Supreme Court of the United States, and the Assignment of Errors which accompanied said petition, the said Petition and Assignment of Errors having been filed in said Supreme Court of the State of Montana on the 31st day of January, A. D. 1916.

6. The Order of the Chief Justice of said Court made on said 31st day of January, A. D. 1916, authorizing the issuance of said Writ of Error.

7. The bond filed by said Great Northern Railway Company on said Writ of Error and to act as a supersedeas.

8. The præcipe of the attorneys for the plaintiff in error Great Northern Railway Company filed with the undersigned, together with acknowledgment of service of a copy thereof on counsel for the defendant in error, indicating the portions of the record to be incorporated into the Transcript of the record on the Writ of Error hereinafter referred to.

9. Also the following original papers filed in my office on the 31st day of January, A. D. 1916, to-wit:

(1) The original Writ of Error sued out by said Great Northern Railway Company as plaintiff in error, pursuant to said order, together with the acknowledgment of the service thereof signed by the plaintiff's attorneys, which said Writ of Error was sued out as aforesaid on the 31st day of January, A. D. 1916, and a copy thereof was lodged with the undersigned as such Clerk on said day for the adverse party in the case, entitled as aforesaid, J. C. Alexander, Administrator of the Estate of John P. Hall, deceased, Respondent, vs. Great Northern Railway Company, Appellant.

(2) The original citation upon said Writ of Error with the acknowledgment of service thereof by the attorneys for the plaintiff, Respondent in this court.

The Undersigned does further certify that he is transmitting herewith the originals of all exhibits filed in said Supreme Court and referred to in the foregoing transcript, and that the costs of the

transcript and record aforesaid amount to the sum of Five Dollars ($5.00), and have been paid by the plaintiff in error.

263 In witness whereof, I have hereunto set my hand and affixed my official seal this 17 day of March, A. D. 1916.

[Seal Supreme Court, State of Montana.]

J. T. CARROLL,
As Clerk of the Supreme Court of the State of Montana.

264 In the Supreme Court of the United States.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error,
vs.
J .C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff in error and the defendant in error in the above entitled cause that the entire transcript of the record heretofore filed in the Supreme Court of the United States shall be printed, and each of the parties waives its right to have an abbreviated transcript printed.

E. C. LENDLEY, *St. Paul, Minn.;*
I. PARKER VEAZEY, JR.,
Gt. Falls, Montana,
Attorneys for Great Northern Railway Company, Plaintiff in Error.

T. J. WALSH,
C. B. NOLAN,
SYDNEY LOGAN,
Attorneys for J. C. Alexander, Adm., Defendant in Error.

March 31, 1916.

265 [Endorsed:] File No. 25,198. Supreme Court U. S. October term, 1915. Term No. 915. Great Northern Ry. Co., Pl'ff in Error, vs. J. C. Alexander, Adm'r, etc. Stipulation of counsel as to printing record. Filed May 2, 1916.

Endorsed on cover: File No. 25,198. Montana Supreme Court. Term No. 915. Great Northern Railway Company, plaintiff in error, vs. J. C. Alexander, administrator of the estate of John P. Hall, deceased. Filed March 25, 1916. File No. 25,198.

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IN THE

SUPREME COURT OF THE UNITED STATES

GREAT NORTHERN RAILWAY COMPANY,
Plaintiff in Error.

vs.

J. C. ALEXANDER, ADMINISTRATOR OF THE ESTATE OF JOHN P. HALL, DECEASED,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

I.

STATEMENT OF THE CASE.

In this case a writ of error (p. 120) has been sued out to review a judgment of the Supreme Court of Montana (p. 86-94) affirming a judgment of the District Court for Flathead County in said State (p. 7) in an action based on the Federal Railroad Employers' Liability Law. Before proceeding with a detailed statement of the case, supported by references to the transcript, we desire merely to state briefly exactly the action taken in the trial court and in the Supreme Court, and the exact question before this court for consideration. Such a brief preliminary statement will serve to show this court the pertinency of the more detailed statement of the case and will lead perhaps to

an anticipation or at least an earlier understanding, of what follows.

(1.)

Preliminary Statement

The action was founded on the Federal Railroad Employers' Liability Law. By the complaint (p. 1-3) the plaintiff, as administrator, alleged that the defendant railroad company was an interstate carrier and that his intestate was employed by it in interstate commerce as a conductor on a work train, and that he was killed by reason of his caboose, at the end of his train as it backed on the main track, colliding with a cow, which, it was alleged, got on the track by reason of the failure of the company to fence its right-of-way against stock. At the trial, however, as will hereafter be shown, the proof showed that the deceased was not engaged in interstate commerce, or indeed in any commerce at all. The defendant accordingly insisted upon the duty of the plaintiff to suffer a nonsuit (p. 38-40), and likewise reiterated the variance as the fifth ground of its motion, at the close of the case, for a judgment of dismissal (p. 69-71), and the defendant expressly insisted "that the variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the Federal Court, whereas, if the cause made by the proof had been alleged, to-wit, an intra-state case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to the defend-

ant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the Federal Court (p. 70)."

This plaintiff, however, resisted this motion on the ground that the proof did show an interstate case, and the Court upheld this contention, overruling the motion for a nonsuit (p. 40) and the motion for judgment (p. 71), and thereupon submitted the case to the jury under instructions expressly stating that the action was based solely on the federal statutes (No. 1, p. 70; Nos. 3 and 4, p. 73-74; No. 6, p. 74-75; No. 8, p. 75-76; and No. 23, p. 80; see also objection, p. 74-77); and the Court expressly refused instructions to the effect that the deceased was not employed in interstate commerce (Requested instructions IA, IB, IC, p. 81).

When the matter then came to the Supreme Court of the State, this action of the District Court was reversed, and the Court held that, under the evidence, as a matter of law the deceased was not engaged in interstate commerce, and that there was therefore a variance between the allegations of the complaint and the proof, and that the variance was material by reason of the fact that the defendant, though having no right to remove an alleged interstate case to the Federal Court, would have a right to remove an intra-state case. Having thus reversed the decision of the trial court, the Supreme Court nevertheless affirmed the judgment on the sole ground that, notwithstanding the fact that the plaintiff in good faith alleged a case under the Federal Railroad Employers' Liability Act and notwithstanding the fact that the trial court was

upholding this allegation and ruling that the case did arise under the federal statute, nevertheless the defendant, after its correct contentions in these particulars were denied both by the plaintiff and by the court, should have filed a petition for the removal of the case on the ground of diversity of citizenship and because the cause did not arise under the federal statute, and, not having done so, it must be deemed to have waived this right.

This admitted variance and alleged waiver of the right of removal is the main question to be argued. Indeed, in the light of the Court's decision that the case arose under the evidence solely under the State statutes, we are in doubt as to whether any other question is before the court. Our confusion is due to the record, which shows that the theory of the plaintiff was that the case arose in interstate commerce and that this theory at the trial was sustained by the trial court, but in the Supreme Court it was held that this theory was incorrect, and yet the judgment was not reversed, notwithstanding the admitted variance, which was conceded to be material and which affected the right of removal. We assume, therefore, that the question of interstate commerce is still in the record, and hence if it shall be held to be an interstate case, we will briefly submit to this court the two questions argued in both the state courts as to whether under the Federal Railroad Employers' Liability Law there was an ynegligence on the part of the defendant and whether the plaintiff's intestate assumed the risk.

(2.)

More Detailed Statement.

With this preliminary statement made we will now proceed to a more detailed review of the transcript on the points to be discussed.

(a)

Did the evidence sustain the allegation that deceased was engaged in interstate commerce?

The proof on the question as to whether or not the deceased was employed in interstate commerce was brief (pp. 15, 16, 17, 20, 21, 24, 25, 26, 28 and 29). A correct summary of it is found in the opinion of the trial court (p. 87). Briefly it showed that deceased was engaged as conductor on a work-train picking up hewn ties that had been cut by farmers in the neighboring hills and left on the right-of-way. He would load these on his train while it stood on the main track and would carry them to the nearest siding, where the cars would be picked up and later taken to Somers, Montana, to the tie-treating plant, where the raw material would be manufactured into the finished product, and this finished product might be used by the Great Northern Company or its allied companies for main line renewals or for the construction of new lines; possibly the finished ties might never be used for railroad purposes at all.

Though the trial court erroneously he ldthis to be interstate commerce, the Supreme Court held it was not.

(b)

Assertions made by Defendant that an interstate case was not made and that Defendant's federal right of removal was being denied.

In the present condition of the case this is the important part of the transcript to be reviewed, showing the claims made in the trial court by the respective parties and showing whether the defendant waived any right of removal.

First, in the complaint itself, in paragraph II, it was expressly charged "that at the time he sustained the injuries hereinafter set forth the said John P. Hull as such conductor and the defendant were engaged in interstate commerce" (p. 2). We have already called attention to the fact that the defendant, in its motion for a nonsuit (pp. 38-40) and in its motion for a directed verdict (pp. 69-71), expressly asserted the variance, and that the failure to recognize it, unless the plaintiff should be allowed to amend and charge an intra-state case, operated to deny to defendant the federal right of removal. We quote the fifth ground of these motions as follows, and we have italicized the express the assertion and not waiver of the right of removal:

"Fifth. There is a fatal variance, amounting to a failure of proof, between the allegations of plaintiff's complaint and the proof, in that it appears from the complaint that this action is based upon the statute of the United States defining the liabilities of railroads while engaged in intesrtate commerce to its employees, but the proof shows that

plaintiff's intestate was not employed in such commerce. *The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the Federal Court, whereas if the cause made by the proof had been alleged,* to-wit, an intra-state case, *the cause could have been remove d,and hence refusal to recognize the variance will operate to deny to defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the federal court."*

Clearly here was no intention to waive any right of removal but, on the contrary, an express insistence on the necessity of recognizing the variance in order that the right of removal might be preserved. The plaintiff, however, insisted that the case under the Federal Railroad Employers' Liability statute had been made out, and the trial court, upholding this contention, overruled these motions and held there was no variance.

Consistently, also, the Court refused a requested charge (No. IA) to return a verdict for the defendant and two requested charges (Nos. IB and IC) that the defendant and the deceased were not engaged in interstate commerce (p. 81), and told the jury, in Instruction No. 1, that the plaintiff based his case on deceased's employment in interstate commerce (p. 72), and expressly charged the jury in Instruction No. 3 (p. 73) that the action was grounded solely on the federal statute. The Court in Instruction No. 4 (p. 73) then set out the federal statute "by virtue of which this action is maintained," and also in Instructions Nos. 6 and 7 (pp. 74 and 75) advise dthe jury what was "neg-

ligence within the meaning of this federal law." That the trial court thus distinctly ruled that the action was maintained solely under the federal law is shown in the settlement of the first instruction to this effect, where the following took place:

> "COUNSEL FOR DEFENDANT: As regards plaintiff's requested instruction No. 3 stating that the Act of Congress by which the action is brought is as follows, and setting forth the act, I take it that the action cannot be maintained under that statute for the reasons stated in our motions?
>
> BY THE COURT: You have embodied that in your Instructions No. 1, which will be refused, and of course you will have your exception to that ruling of the court.
>
> COUNSEL FOR DEFENDANT: It is unnecessary for us to make additional objections and take exceptions as to that phase of the case?
>
> BY THE COURT: Yes."

We go into this in some detail because, in the opinion of the Supreme Court of the State, it is vaguely suggested that the case was not decided in the trial court solely on the federal statute (p. 88). From the foregoing, however, it is clear that the question of employment in interstate commerce was a question of law argued *pro* and *con* before the trial court and decided in favor of the allegations of the complaint, and that the cause was submitted to the jury solely as a federal case. The trial court recognized that, if defendant's views of the interstate law were correct, there was a variance and that the asserted right of removal should be protected, but, taking the view that a federal case was made and submitting the case to the jury solely

on the federal statute, the trial court deemed that defendant's rights, by its assertion of the variance and of its materiality under the removal statutes, had been amply asserted before the Court and any error to its prejudice fully preserved as far as any question of practice was concerned.

The above sets forth all of the proceedings involving the alleged waiver of the right of removal.

(c)

Evidence as to negligence and assumption of risk.

The sole charge of negligence made in the complaint was that defendant had not fenced its right-of-way against stock (Paragraphs III and IV, p. 2), and it was conceded that the right-of-way at the place in question and practically over the entier division where deceased had worked had never been fenced. The evidence on this issue and on the issue of assumption of risk, if these matters can still be considered in the case, if plaintiff still contends that an interstate case was made, will be briefly presented under appropriate headings in the brief of the argument.

II.

SPECIFICATION OF ERRORS.

(1) It was an error in the Supreme Court of the State to render its judgment affirming the judgment of the District Court.

(2) It was error in the Court to refuse the requested instruction No. IA of the defendant Great Northern Railway Company, as follows: No. IA: "You are instructed to return a verdict for the defendant."

(3) It was error in the Court to overrule the motion of the defendant Great Northern Railway Company for a judgment of nonsuit and dismissal upon the plaintiff's testimony (pp. 38-40).

(4) It was error in the Court to overrule the motion of the defendant Great Northern Railway Company for a judgment of dismissal at the close of all the evidence in the case (pp. 69-71).

(5) It was error in the Court to hold that, although the complaint alleged that the defendant was engaged in interstate commerce and plaintiff's intestate was employed in such commerce, while the proof showed that the plaintiff's intestate was not employed in such commerce, and although the defendant moved for a dismissal on the ground of this variance, and specifically asserted in said motion that a failure to recognize the variance and to sustain the motion would deprive the defendant of its right to remove the case to the United States courts if properly pleaded to accord with the proof, and although the defendant at the trial and in its said motion insisted that, though the cause alleged arose under the Federal Employers' Liability Law, the case proved did not arise under said law, and although the plaintiff insisted that the case proved did arise under said law and did accord with the case alleged, and although the trial court overruled defendant's contentions and motion aforesaid and sustained the plaintiff's said contentions and held that the case proved accorded with the case alleged and arose solely under the federal law, and submitted said case to the jury solely under said federal law, and did not sustain defendant's said motion with leave to the plaintiff to amend so as to strike out the disproved allegations in regard to interstate commerce, nevertheless the defendant could and should have filed its petition for a removal of said cause to the United States courts during the trial of said cause or at the conclusion of the taking of the evidence therein and while said cause as pleaded and as upheld by the trial court was in the condition aforesaid, and, not having done so, waived said right of removal.

BRIEF OF THE ARGUMENT.

III.

A.

The Alleged Waiver of the Right of Removal.

(1)

State Supreme Court held solely that variance existed requiring removal, but that, as a matter of procedure, the federal right of removal had been waived.

The plaintiff in his complaint and the trial court in its ruling held that this case was based on the Federal Employers' Liability Act. The defendant in its motions and in its requested instructions denied this. The Supreme Court of the State in its decision upheld the defendant's view.

The plaintiff contended that there was no variance between the allegations of the complaint and the proof, and the trial court agreed with the plaintiff. The defendant, in its motions and by its requested instructions, said that there was such a variance, in that the complaint charged an interstate case while the proof showed only an intra-state case. Again the Supreme Court of the State upheld the defendant's view.

The defendant contended that this variance operated to deprive the defendant of the right to remove the cause, if it had been pleaded as an intra-state case in accordance with the proof, to the Federal Court. The trial court denied this because it held that an interstate case had been proved. Again the Supreme Court upheld the defendant's view and held that the variance was material as affecting the right of removal.

Upon what ground then did the Supreme Court affirm the judgment? Solely upon a matter of practice. Solely because a petition for the removal of the case was not filed at the close of the trial. That Court conceded that plaintiff alleged an interstate case and should, in accordance with the proof, have alleged an intra-state case. The Court conceded the variance and conceded ,as asserted by the defendant, that a failure to recognize it would defeat the right of removal, and the Court conceded that defendant's right of removal, if the case made by the proof had been pleaded, was clear; but the Court finally held that this right had been waived, apparently because the cause first became removable, in the opinion of the Supreme Court, when the variance appeared, and therefore the Supreme Court held that, notwithstanding the plaintiff and the trial court held the cause still to constitute an interstate case, defendant should have gone through the mere form of filing a petition for removal merely to have it denied, because untimely filed, and not having done so it waived this right of removal. The actual decision of the State Court is thus found in some dozen lines as follows (p. 88):

> "Accepting this as authoritative we are impelled to the view that the decedent was not at the time of his death employed in interstate commerce, and there fore the action was not sustained under the Federal employers' Liability Act. It does not follow from this, however, that the appellant was or is entitled to a reversal. It is now settled that where the compliant declares under the federal law, failure to sustain it under such law is not fatal, but recovery may still be had under the state law (Wabash R. R. Co. vs. Hayes, 234 U. S., 86; Jones vs. C. & O. Ry. Co.,

149 S. W., 951). *We recall but one respect in which a defendant can be seriously prejudiced in such a situation, and that is where by reason of diverse citizenship removal of the cause to the federal court might be in order. In such a situation, however, the defendant must assert its right, under penalty of waiver, by filing a petition to remove at the first opportunity.* (Powers vs. Ry. Co., 169 U. S., 92; Kansas City etc. Ry. Co. vs. Daughtry, 130 U. S., 298; Golden vs. Northern Pac. Ry. Co., 39 Mont., 435; Dempster vs. Oregon Short Line R. R. Co., 37 Mont., 335.) *This appellant did not do.*"

It was charged in the complaint and admitted in the answer that the defendant was a citizen of Minnesota and the plaintiff testified that he was a citizen of Montana (pp. 13-14).

(2)

Federal Supreme Court not bound by State Court's decision as to procedure for asserting federal right of removal.

We have shown that the defendant, far from waiving, expressly asserted the variance, and that it operated to prejudice the defendant by allowing the plaintiff a recovery on a case not pleaded, which, if pleaded, defendant could have removed; and it is clear that the trial court also endeavored to protect every right of the defendant and recognized that nothing was waived, but overruled defendant's objections because the trial court considered the case arose under the Federal Law. The State Court has, however, held that, as a matter of practice, the right of removal was waived.

Under the federal decisions, however, if it is clear that a federal right was specifically set up and claimed, the Federal Court will not allow the State Court, under

the guise of mere procedure, to deny the federal right. Thus in

Atlantic Coast Line R. Co. vs. Burnette, 36 Sup. Ct. R. 75,

it was contended that the limitation as to the time within which an action could be brought under the Federal Railroad Employers' Liability Law must, under the State rules of practice, be pleaded, but the Federal Court held that where the federal right of immunity from suit had been clearly asserted, the State Court could not take away this right by any mere assertion that it had not been properly asserted under any technical rule of alleged procedure. Thus the Federal Supreme Court said:

> "In dealing with the enactments of paramount authority, such as congress is within its sphere over the states, we are not to be curious in nomenclature, if congress has made its will plain, *nor to allow substantive rights to be impaired under the name of procedure* (Cent. Vt. R. Co. vs. White, 238 U. S., 507, 511; 59 L. Ed. 1433, 1436; 35 Sup. Ct. R., 865)."

That this is a wise rule of the federal courts not to allow a plainly asserted federal right to be denied on the alleged ground that some technical rule of procedure has not been observed is shown by the fact that, so often in the matter of procedure the federal courts realize that procedure is but a means to an end, while the state courts are less liberal and are apt to regard procedure as an end in itself. Witness the decision of our State Court that, under a statute requiring a notice of appeal to be filed and served, the order of service is material and the appeal is insufficient if the

notice is served and filed (State vs. District Court, 34 Mont., 112; 85 Pac. 872). Witness also two decisions, one to the effect that a notice of appeal by several defendants from an order denying their motion for a new trial is fatally defective if the motion is described as defendant's (apostrophe before instead of after the "s") motion, and, conversely, that a notice of appeal by one defendant from an order denying its motion for a new trial is fatally defective if the motion is described as defendants' (apostrophe after instead of before the "s") motion (Anderson vs. No. Pac., 34 Mont., 181; 85 Pac., 884; Hall vs. Butte Electric E. Co., 39 Mont., 144; 101 Pac., 965). These decisions have their counterpart in the decisions of nearly every state court and illustrate the peculiar fact that the federal courts, adhering to ancient form, are more liberal in procedure than the state courts, with their simpler practice encumbered by technical decisions. These decisions illustrate also the wise jealousy with which the more liberal federal court should insist that where the federal statutes give a right of review, if a federal right has been specifically set up and claimed, the federal courts will determine when such federal right has been specifically set up and claimed.

(3)

Removal petition improper, as question of interstate commerce is a mixed question of law and fact, which plaintiff is entitled to have decided by state court in first instance.

The Federal Railroad Employers' Liability Law expressly provides that an action based thereon cannot

be removed to the federal courts. It may, at plaintiff's election, be brought either in the state court or in the federal court, and if brought in the state court it cannot, over plaintiff's objection, be removed (Kansas City So. R. Co. vs. Leslie, 238 U. S., 599; 59 L. Ed., 1478; 35 Sup. Ct. R., 844).

The statutes providing for the removal of causes are to the same effect.

Since the complaint charged, therefore, that the case arose under the Federal Employers' Liability statute and the trial court upheld this contention, there could be, under these statutes, no removal of the case as then framed. The only way it could be removed would be by the defendant moving for a nonsuit, and thus compelling the plaintiff, in order to escape the same, to confess the variance and ask leave to amend so as to change the interstate case in to an intra-state case and, on the motion being sustained and the amendment being then applied for and allowed, then for the first time the cause woul dbe removable.

But, as long as the plaintiff charged that his case was based on the federal statute, either as a matter of disputed evidence or as a matter of disputed law, he was entitled to assert that the case was based as he chose to base it, and to have any disputed question of fact or law as to such a case, so based, determined in the state court of his selection.

Aparently the Supreme Court bases its decision on the proposition that if there is, as is perhaps true here, no dispute o nthe evidence, then only a question of law arises as to whether or not the employee was

engaged in interstate commerce, and if the proof shows no interstate case then the cause may be removed, even though the plaintiff alleges in the complaint an interstate case, and still contends that the proof sustains that allegation and declines to strike it out. The State Supreme Court reached this conclusion notwithstanding the fact that the trial court was also in accord with the plaintiff and ruled that the case was based on the federal statute.

The State Supreme Court has thus overlooked the fact that the question of interstate commerce is a mixed question of law and fact which the plaintiff is entitled to have determined in the first instance by the state court of his selection. If there is a dispute as to the facts, the plaintiff cannot be denied the right to have that dispute determined by the state court. So also, even though the parties are in accord on the facts, if there is a dispute on the law (which may be said to be the ultimate fact) as to whether the evidence establishes an interstate case, plaintiff cannot be denied the right to have that dispute also determined by the state court he has selected.

The plaintiff has a right to base his case on whatever law or evidence he deemed best for himself. Indeed the framing of the case, either as a state case or as an interstate case, rests entirely with the plaintiff, and the defendant is called upon merely to meet that case.

St. L. etc. R. Co. vs. Hesterly, 33 Sup. Ct,, R. 703 at 704;

St. L. etc. R. Co. vs. Seale, 33 Sup. Ct. Rep., 650 at 651, 229 U. S. 156; 57 L. Ed. 1129.

As long, therefore, as the plaintiff alleged to insisted that he based his case on the Federal Liability Law, the case arose under that law and could not be removed. Add to this that the trial court upheld him. Clearly, therefore, the case was based on the federal law.

(4)

Federal Supreme Court has already denied validity of State Supreme Court's decision in this case.

Let us bear in mind that at the close of the evidence, the time when the State Supreme Court held the removal petition should have been filed, the complaint still charged an interstate case and the plaintiff was arguing that the proof showed an interstate case and the trial court was ruling that the case was based solely under the interstate statute.

This being the case the defendant in the then condition of the case, under a recent decision of this Court, could not have filed a petition for the removal of the case (So. Ry Co. vs. Lloyd, 36 Sup. Ct. R., 210; 239 U. S. 496; 60 L. Ed.,.....).

What would such a petition have charged? It could not honestly be verified if it alleged that the case was not based on the interstate statute; it could not even charge that the allegation of interestate commerce was not made in good faith. All it could possibly charge would be that the plaintiff had alleged

an interstate case and that at the close of the plaintiff's evidence the defendant was of the opinion that the cause, as one basedon the interestate statute, was not proved, but that plaintiff, still in good faith, contended that the cause was so based. Clearly this is merely a denial of the allegations of the complaint. Assume also that the petition added that the trial court was upholding the plaintiff and ruling that the case was based on the federal statute. Such a petition would be manifestly denied at once.

As the trial court ruled that the case was based on the federal statute, the only object of requiring the defendant to call attention to variance again and to file a petition for removal would be simply to have the question raised twice and to have it go through the useless ceremony of filing the petition merely to have it denied.

We contend that, since the date of the State Supreme Court's decision, the Federal Supreme Court has decided this case and has held that in its then condition, and as long as the plaintiff claimed the case to be an interstate one, a petition for removal was not proper, and hence in this case the defendant asserted its federal rights exactly and properly, and the manner pointed out by the State Supreme Court would not have been proper. Thus in the case of the Southern Railway Co. vs. Lloyd, *supra,* this Court says:

"The Southern Railway Company in due season filed its petition for the removal of the case, alleging that the plaintiff was not engaged in interstate commerce at the time of the accident, that the engine upon which he was injured was not engaged in any kind of commerce at the time of the accident, and that these alle-

gations in the petition were fraudulent and false, which the plaintiff knew or could have ascertained by the exercise of the slightest diligence upon his part.

"From the statement of the case already made it is apparent that the plaintiff sought to recover under the Federal Employers' Liability Act. On the face of the petition a case was made invoking the purisdiction of the State Court to recover under the federal act.

"In no case can the right of removal be established by a petition to remove which amounts simply to a traverse of the facts alleged in the plaintiff's petition, and in that way undertake to try the merits of a cause of action good upon its face (Chesapeake & O. R. Co. vs. Cockrill, 232 U. S., 146; 58 L. Ed., 544; 34 Sup. Ct. R., 278).

"The Act of 1910 expressly gives jurisdiction to the State Court and provides that no case arising under its provisions brought in a state court of competent jurisdiction shall be removed to any court of the United States. Section 28 of the Judicial Code, 36 Stat. at L., 1087, Chapter 231, Comp. Stat., 1913, Sec. 1010, contains a like provision. *Such right did not arise from the allegation of the removal petition that the injury did not happen in interstate commerce.*"

Another decision is helpful. Thus the converse situation, compared to the situation in this case, is found in

St. L. etc. R. Co. against Seale, 33 Sup. Ct. R. 651, at 653

where the defendant moved for directed verdict on the ground that a case had been brought under the state statute and the proof showed that liability, if any, would have to be based on the Federal statute. The state Court held that advantage could be taken of this only by pleading the Federal Statute and by a

plea in abatement. In this situation, taking the converse of the present case, the Court said:

> "The plaintiff's petition, as rules by the state court, stated a case under the state statute. The defendant, by its special exceptions, called attention to the Federal Statute and suggested that the state statute might not be the applicable one, but the plaintiffs, with the sanction of the Court, stood by their petition. *It was to the case therein stated that the defendant was called upon to make defense.* A plea in abatement would have been unavailing because the plaintiffs were the proper parties to prosecute that case. When the evidence was adduced, it developed that the real case was not controlled by the state statute but by the federal statute. In short, *the case pleaded was not proved, and the case proved was not pleaded.*"

It is respectfully submitted, therefore, that when the Supreme Court held that the defendant's motions, based upon the variance, were well taken, and that the variance existed because the complaint charged an interstate case and the proof showed an intra-state case, and that the variance was material as regards the right of removal, the State Supreme Court erred in deciding further that the plaintiff coul dnot be compelled to amend to conform to the proof so as to protect the right of removal, and that the error became immaterial because defendant did not then file a petition for the removal of the cause. The State Supreme Court, recognizing the variance and its materiality and the validity of defendant's motions, should should have reversed the judgment with directions to sustain the motions. If the plaintiff on the sustaining of the motions should then obtain leave to amend,

then the cause would become removable for the first time, and then a petition could properly be filed, and this is what should be required.

If the defendant had followed the practice laid down in the State Supreme Court decision, it could properly be told that it had not pursued the proper method and that its petition was properly denied. In, however, asserting the variance in its motions and in withholding its petition for removal until the plaintiff should amend and charge an intra-state case, the defendant asserted all of its federal rights in the only way they could be asserted.

(B)

No Federal Negligence From the Failure to Fence.

If the judgment can be sustained on the theory that an interstate case was made, then the question of negligence and assumption of risks remains to be argued, but, as it seems to us clear that a federal case was not made, we will review the evidence very briefly.

The railroad division in question embraced about 300 miles and not more than 25 miles were fenced. The Marion Branch, where the accident happened, was not fenced at all (pp. 24, 26, 86, 98, 99 and 115).

As regards the danger of derailments when cattle are struck, all witnesses, including plaintiff's, conceded that substantially there was no danger unless when the train was being backed, as in the instance in question, in violation of rules. All of the evidence bearing on this matter will be found in the following references to the transcript: Pp. 35, 36, 45, 46, 48, 49, 50,

54, 55, 67, 68, 69, 98, 100, 102, 104, 118, 119, 122, 129, 144, and 145. The defendant's testimony, by detailed figures, merely showed the reason for the absolute imposibility of the plaintiff's witnesses being able to avoid these admissions or of the plaintiff attempting to develop the theory that an unfenced line is dangerous. On the division in question during six years about 200 head of stock had been killed a year in the operation of trains, and, in the course of that period of striking 1200 animals, there had been but one derailment (pp. 98, 99, 100 to 118). It was not the universal custom or any custom at all to fence railroads, and, in any event, they were not fenced for the purpose of protecting employees but for the purpose of accommodating farmers.

The Marion Branch line was a short branch line. The only train service on that branch consisted of a mixed train running from Kalispell to Marion twice a week, for about 15 miles and on a slow schedule (pp. 32, 89 and 105).

The foregoing references to the transcript refer to the pages of the State Court's transcript.

The following authorities hold that there is no duty to fence at common law, and it was not contended that there was any statute in Montana requiring fencing. Indeed, there is no federal authority and no state decision, other than dicta, squarely holding that in the absence of a statute there is any such duty:

Cowan vs. U. Pac. R. Co., 35 Fed., at 43;
Carper vs. Receivers, 78 Fed., 94, at 99;
Newsom vs. N. &. W. Ro Co., 81 Fed., 133, at 135;

Gill vs. L. & N. R. Co., 160 Fed., 260, at 261;
Gill vs. L. & N. R. Co., 165 Fed., 438;
Neilson vs. C. B. & Q. R. Co., 187 Fed., 393, at 395;
Crilly vs. Tex. & Pac. R. Co., 10 So., 400, at 401; 44 La. Ann., 755;
Patton vs. Cent. Ia. R. Co., 35 N. W., 149 at 149 to 150;
Fleming vs. St. P. & D. R. Co., 27 Minn., 111; 6 N. W., 448;
Snyder vs. Penn. R. Co., 206 Pa. St., 619; 55 at L., 778;
Ward vs. Bonner, 80 Tex., 168; 15 S. W., 805;
McMasters vs. Mont. Union R. Co., 12 Mont., 163, at 171; 30 Pac., 268;
Nixon vs. Montana etc. R. Co., 50 Mont., 95;
Bejma vs. C. & N. Elec. R. Co., 149 N. W., 588, at 590.

C

ASSUMPTION OF RISK.

We contend that, if the case is based on the interstate statute, defendant was entitled to a directed verdict also on the issue of the assumption of risk, because the deceased knew of the unfenced condition of the line.

As regards this proof, first we would call attention to the fact that the proof shows that the entire division had never been fenced (pp. 24, 98, 99 and 115). It is not a case, therefore, where an employee working on a line generally fenced is suddenly directed to work at a place where the normal conditions are changed. The normal conditions were that there was no fence. Moreover, it is not a case where the fence was simply out of repair. The line had never been fenced. Here was no temporary condition due to anyone's careless-

ness. Here was a permanent condition always existing, indicating a fixed policy.

The deceased's work elsewhere on the division would have advised him of these conditions. He had worked for the company on this division 2½ years (pp. 105-106), and he frequently ran trains from one end of the division to the other. Moreover his work was chiefly in the work-train service, involving hauling gravel and picking up ties, ballasting the track and piling snow fences, and all work incident to the work-train service. He was thus not in the position of any employee hurrying over the line for the first time; his work was work requiring him most of the time to be out on the right-of-way, and when proceeding along the track he would run slowly, and therefore undoubtedly he knew of the unfenced condition (pp. 51, 30, 31). His progress would be slow, and he might be standing for hours right on the main line and working out on the right-of-way. He was operating unedr conditions which gave hi mabundant opportunity and the most favorable conditions to observe the facts.

Moreover, the very work he was doing on the Marion Branch shows he knew the facts (Transcript, pp. 133, 134, 135, 136, 137, 141, 142 and 143). He was loading ties right on the right-of-way where the train would be standing on the main track for two or three hours loading a car, and a part of this loading had taken place right in the vicinity of the accident. During part of this time the crew saw cattle on the track and slowed down, and on another occasion whistled, and this was kept up for three minutes and the stock

had to be driven off, and all the work was done in broad daylight.

This shows his knowledge irrespective of the proof of his own declaration in disposing of the crew and his direction to the crew as to where they should stand as the train backed and his own statement that he himself would be riding the platform of the caboose, as the train backed, with a lighted fusee, watching out for stock; and this was the only reason why he would be on the rear platform holding the lighted fusee looking out for stock (pp. 93, 94, 96, 98, 32, 88, 89, 105, 87).

On much less convincing proof than this it was held in the following authorities that the deceased assumed the risk:

Crilly vs. Tex. & Pac. R. Co., 44 La. Ann., 75; 10 So., 400, at 401.
Houston etc. R. Co., vs. Quile, 55 S. W. 1126;
Fleming vs. St. P. & D. R. Co., 27 Minn., 111; 6 NW., 448 at 449;
Patton vs. Central Ia. R. Co., 73 Ia., 306; 35 NW., 149;
Ward vs. Bonner, 80 Tex., 168; 15 SW., 805, at 806.
Sweeney vs. Cent. Pac. R. Co., 57 Cal., 105, at 105.

CONCLUSION.

It is respectfully submitted that if the trial court was right in submitting the case as an interstate case, then, under the federal decisions, there was no negligence on the part of the defendant, and, in any event, the deceasd assumed the risk. If, on the other hand, the Supreme Court of the State was right in holding

that there was no federal case made, then there was a variance between the allegations of the complaint and the proof, which prejudiced the defendant in the right of removal, and this Court should direct the reversal of the judgment so that the variance might be recognized and the defendant's rights protected. Undoubtedly the trial court would have sustained the motion and dismissed the case, or compelled the plaintiff to amend, if the trial court had been of the opinion that no federal case was made.

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IN THE

Supreme Court of the United States

GREAT NORTHERN RAILWAY COMPANY,

Plaintiff in Error,

vs.

J. C. ALEXANDER, Administrator of the Estate of John P. Hall, Deceased,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT

Before discussing the legal propositions which are urged by the plaintiff in error, it may not be inappropriate to make a brief preliminary statement as to the facts. The plaintiff in error, the Great Northern Railway Company, owned and operated an interstate railroad, and was engaged in interstate commerce. The decedent, John P. Hall, was a conductor in the employ of the company. The company owned and operated a branch line which connected with the main interstate line. On this branch line, interstate commerce was carried. Antedating the 11th of October, 1911, Hall was oper-

ating a work train on the main line handling material for its up-keep and maintenance. (Tr. p. 15). He was transferred from the main line to this branch line about eight days before he was killed. On the branch line, the work train was collecting ties along the line. On this branch line was located the city of Kalispell, and removed from Kalispell a distance of four or five miles was the town of Somers, at which place the company operated a plant where the ties were treated chemically before use in the up-keep of the road. After the ties received treatment at this plant at Somers, they were to be distributed along the line of the road and used in its up-keep wherever there was need for them. Along this branch line, the ties were piled up and loaded on cars and brought to Kalispell by this work train, thereafter to be taken to Somers for the purpose stated. This work train sometimes left Kalispell in the morning and returned there in the evening, and sometimes it remained at intermediate points between where the work was being done and Kalispell during the night time. This branch line runs through a thickly settled country in which cattle abound. These cattle were in the habit of getting on the track, thus rendering the running of trains, through derailment, dangerous. (Tr. p. 11 and 12). This danger could have been prevented by fencing the line of

road. This was not done. On this branch line, if the work train started out in the morning from Kalispell, the engine ahead, the lack of facilities was such that the train returning to Kalispell in the evening, the engine would be on the end of the train with the caboose ahead. There was no turn table along the line. Nor were there any facilities by which the engine could be placed at the head of the train on the return trip, (Tr. p. 20) except through making a flying switch. (Tr. p. 17). At any rate, as operations were carried on, the flying switch method was not resorted to, and the backing of the train, not only on the branch line but on the main line, was effected in the manner suggested. On the evening of the 11th of October, 1911, after the loading of ties had been carried on during the day, the cars so loaded were placed at a siding at Kila, a station on this branch line, to be subsequently brought to Kalispell, and the work train, consisting of the engine, two cars (which were used for commissary purposes) and the caboose, started for Kalispell with the engine in the rear and caboose in front. (Tr. p. 20).

The derailment of the caboose occurred on account of the striking of a cow on the track, as a result of which Mr. Hall was instantly killed. The complaint alleged that Mr. Hall, at the time that he was killed, was engaged in interstate commerce.

The answer of the defendant company denies this, and set up the affirmative defenses of assumed risk and contributory negligence. Upon the submission of the evidence for the defendant in error (the plaintiff in the trial court) a motion for a nonsuit and dismissal of the action was made. (Tr. p. 38). And, again, at the close of all the evidence, motion of like character was made. (Tr. p. 69).

The trial court held that Mr. Hall was engaged in interstate commerce at the time of his death, and so instructed the jury. (Tr. p. 73).

The case was taken on appeal by the defendant company to the Supreme Court of the State of Montana. There it was held that the trial court was in error in holding that Mr. Hall was engaged in interstate commerce when killed, but held that the error was without prejudice, as the federal law, under which the case was tried, was more favorable to the defendant company than the state law, and that the only disadvantage that the defendant suffered by reason of this error was in being prevented from taking the case to the federal court, in the event that it elected or desired so to do, and that in the proceedings which took place in the trial court, the defendant company elected to try the case in the state court, and by its conduct and acts, waived the right to have the case transferred. (Decision of Supreme Court, Tr. p. 87. Alexander

v. Great Northern Railway Company, 51 Mont. 565).

Assuming now that the trial court erred in holding that the deceased was engaged in interstate commerce, the error is the only one of which the plaintiff in error can complain, and this error we contend, under the decisions of this court, is non-prejudicial. The defendant in error contends that the case being tried under the federal law, the plaintiff in error was more favorably situated than if the case was tried under the state law. The only disadvantage that it suffered was that if the case was tried under the state law, a transfer of the case could be had to the federal court. This right it might elect to exercise or might not. It is too obvious that it didn't care to assert this right to have the case transferred. If the case was under the state law, the provisions of law that would be applicable are as follows:

Section 2:

"In all actions hereafter brought against any such person or corporation so operating such railroad, under or by virtue of any of the provisions of this Act, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe; Provided, That no such employe who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the viola-

tion by such person or corporation so operating such railroad of any statute enacted for the safety of employes contributed to the injury or death of such employe."

Section 3:

"An employe of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment when such risk arises by reason of the negligence of his employer or of any person in the service of such employer."

(Laws of Montana, 12th Session, Chap. 29, page 47).

The sections of the federal liability law applicable are as follows:

Section 3:

"That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

Section 4:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to

have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

(Federal Liability Law, 35 Stat. at Large, page 65).

It will be seen that the provisions of the federal liability law *supra*, are more favorable to the defendant company as to assumed risk than is the provision of the state law, *supra*. In all other respects, the principles of law governing liability were the same whether the case was tried under the state law or under the federal liability law.

In the sase of

Chicago & N. W. Ry. Co. v. Gray, 237 U. S. 399; 59, L. Ed. 1018,

this court said:

"Of course, the argument for the railway company is that Gray's employment on the cinder pit was employment upon an instrument of interstate commerce, and so an employment in interstate commerce as fully as that of a track repairer in Pedersen v. Delaware, L. & W. R. Co. 229 U. S. 146 * * * But we find it unnecessary to express an opinion upon this argument, since, if there was an error, it seems to have done the railway company no harm.

"There are differences and similarities between the Wisconsin and federal statutes, but we do not perceive that there is any difference that made the railway company's position worse if tried on the hypothesis that the state law governed."

In the case of

Kansas City Western Ry. Co. v. McAdow, 240 U. S. 50, 60 L. Ed. 520,

this principle was again announced in the following language:

> "But these questions really are immaterial here since the Kansas statute is so similar to that of the United States that the liability of the defendant does not appear to be affected by the question which of them governed the case. In such circumstances, it is unnecessary to decide which law applied."

Also in the case of

Chicago R. I. & Pac. Ry. Co. v. Wright, 239 U. S. 548. 60 L. Ed. 431,

this court said:

> "As the injuries resulting in the intestate's death were sustained while the company was engaged, and while he was employed by it, in interstate commerce, the company's responsibility was governed by the employers' liability act of Congress. * * * And as that act is exclusive and supersedes state laws upon the subject, it was error to submit the case to the jury as if the state were controlling * * *
>
> "But error affords no ground for reversal where it is not prejudicial, and here it is plain that the company was not prejudiced. While there are several differences between the state act and the act of Congress, the only difference having a present bearing is one relating to contributory negligence. The state act declares that in cases where the employee's negligence is slight and that of the employer is gross in comparison, the former's negligence shall not bar a recovery, but shall operate to diminish the damages proportionally. In other cases contributory negligence remains a bar as at common law. * * * The act of Congress, on the other hand, declares

that the employee's negligence shall not bar a recovery in any case, but shall operate to diminish the damages proportionally in all cases, save those of a designated class, of which this is not one. Thus, it will be seen that the state act is more favorable to the employer than is the act of Congress. The instructions to the jury followed the state act, and consequently were more favorable to the company than they would have been had they followed the act of Congress. To illustrate: under the instructions given, a finding that the intestate's injuries were caused by concurring negligence of the company and himself, and that his negligence was more than slight and the company's less than gross, must have resulted in a verdict for the company, while under the instructions following the act of Congress, such a finding must have resulted in a verdict for the plaintiffs, with the damages proportionally diminished. Of course, no prejudice could have resulted to the company from the instructions being more favorable to it than they should have been under the controlling law."

See, likewise, sustaining like doctrine;

Wabash Ry. Company v. Hayes, 234 U. S. 86, 58 L. Ed. 1226;

Louisville & Nashville Ry. Co. v. Parker, 242 U. S. 13, 61 L. Ed. 119;

Ill. Cen. Ry. Co. v. Nelson, 212 Fed. 69.

But it is asserted that the trial court holding as it did, the defendant company was denied the right to transfer the case from the state court to the federal court. There is no proposition so fundamentally settled than that where the jurisdiction of the federal court rests upon diverse citizenship, the right to transfer must be asserted

when that fact is first disclosed, and unless then asserted, the right to transfer is waived or lost.

Powers v. Ry. Co. 169 U. S. 92, 42 L. Ed. 673.

Equally well settled is the proposition that when the fact of diverse citizenship is disclosed , where the action is pending in the state court, the jurisdiction of the state court should not be invoked respecting matters over which it has jurisdiction, and if this is done, the right to transfer is waived or lost.

Before referring to the cases which uphold the doctrine here contended for, we desire to submit for consideration the motion which was interposed when, from the view-point of the defendant company, the fact was disclosed that the federal statute did not apply. Upon the submission of the plaintiff's evidence, the following motion was interposed (Tr. pp. 38-40):

> "Comes now the defendant in the above entitled cause and, at the close of the plaintiff's testimony and when all of the testimony of the plaintiff had been adduced, and moves the court for a judgment of non-suit and dismissal upon the merits, upon the testimony aforesaid, upon the following grounds:
>
> "First. That the testimony adduced by the plaintiff does not constitute facts sufficient to constitute a cause of action.
>
> "Second. That the testimony adduced by the plaintiff does not show the violation by defendant of any legal duty owing to plaintiff's intestate.

"Third. It appears from the complaint that this action is based upon the federal statute defining the liability of railroads for injuries to, or deaths of, employees by reason of negligence, and the question as to the meaning of 'negligence' under this statute, and as used in this statute, is necessarily a federal question; that the sole ground of negligence charged is a failure to fence the railroad track in question, and this question, therefore, as to whether any duty was owing to plaintiff's intestate to fence the track under the case as made in the complaint, must be determined as a question of federal law aside from any statute of the state of Montana; and under all the federal decisions and under the federal law, there is no duty owing to an employee to fence the track; and hence, there being no federal or other duty, there can be no liability under the federal statute, in the case as framed by the pleadings. As regards the Montana so-called fence statutes, they did not impose an absolute duty to fence, and, by their terms and by their restrictions, contained in the titles to the legislative acts of Montana, the duty to fence is not one which inures to the benefit of employees, or for a violation of which a cause of action can arise in favor of an employee, or his administrator, to recover damages by reason of his injuries or death; and such statutes, moreover, can have no bearing in an action brought under said federal law.

"Fourth. It appears from the complaint that the sole ground of negligence charged is a failure to fence the railroad track in question. By the Common Law, there was no duty resting upon defendant in favor of plaintiff's intestate to fence its tracks; and under the statutes of Montana, the original code did not create any duty to fence, but merely provided what fences should be erected by railroad companies if they did fence, and left the option

with the adjoining farm owners to determine whether there should be a fence, and did not embody any obligation except in the case of adjoining farm owners, only, who owned farms immediately adjoining the railroad track; and subsequent amendments by legislative enactment, by reason of the titles of such acts being limited to liability for stock killed, cannot create a duty to an employee for the liability of the death of plaintiff's intestate, the title to such acts being insufficient to cover the case of damages to persons, or any damage or liability other than damage or liability for stock. Hence, as there was no legal duty owing to plaintiff's intestate, there cannot, in any event, be any negligence.

"Fifth. There is a fatal variance, amounting to a failure of proof, between the allegations of plaintiff's complaint and the proof, which variance amounts also to a failure of proof in that it appears from the complaint that this action is based upon the statute of the United States defining liability of railroads, while engaged in interstate commerce, to its employees, or their families while such employees are employed in such commerce; and it is alleged in the complaint that at the time plaintiff's intestate was killed, defendant was engaged in inter-state commerce, and that he was employed by defendant in such commerce; but the proof adduced by the plaintiff does not show or tend to show these allegations to be true; and, on the contrary, shows that according to the plaintiff's proof, the defendant was not at the time engaged in inter-state commerce; that plaintiff's intestate also was not employed in such commerce, but that at said time defendant was engaged only in intrastate commerce, if any commerce, and that plaintiff's intestate was employed, if in any commerce, only in intra-state commerce. The proof shows that the only work being done

by the deceased was the loading of ties left on the right of way by contractors who had cut the same in the neighboring hills, and that these ties, as raw material, were to be sent to the tie treating plant at Somers, where the raw material was to be treated and manufactured into the finished product or tie, which finished product might or might not thereafter be used in commerce inter-state or otherwise, by defendant or anyone else, and especially that the same might be used only in the construction of new lines not owned or operated by defendant, and in fact not in operation but owned or being constructed by different companies other than the defendant. The work done by plaintiff's intestate was not in any way connected with any commerce, but was at most preparatory to, or anterior to, commerce later to be undertaken. The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in inter-state commerce, the defendant could not remove said cause to the federal court, whereas, if the cause made by the proof had been alleged, to-wit, an intra-state case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the federal court, and a refusal to recognize such a variance permits the plaintiff to allege a cause of action under the laws of one sovereignity, to-wit, the United States, and to maintain or seek to prove a cause of action under the laws of another sovereignty, to-wit, the State of Montana.

"This motion is based upon the complaint of the plaintiff and the records and files in this cause, and upon the testimony aforesaid."

And, again, upon the submission of all of the evidence the following motion was interposed, (Tr. pp. 69-71):

> "Comes now the defendant in the above entitled cause and at the close of all of the evidence in the case and when all the testimony in the case had been adduced, and moves the Court for a judgment of dismissal upon the merits upon the testimony aforesaid, upon the following grounds:
>
> "First. That the testimony adduced in the case does not constitute facts sufficient to constitute a cause of action.
>
> "Second. That the testimony adduced in the case does not show the violation by defendant of any legal duty owing to plaintiff's intestate.
>
> "Third. It appears from the complaint that this action is based upon the federal statute defining the liability of railroads for injuries to, or deaths of employees by reason of negligence, and the question as to the meaning of 'negligence' under this statute, and as used in this statute, is necessarily a federal question; that the sole ground of negligence charged is a failure to fence the railroad track in question, and this question, therefore, as to whether any duty was owing to plaintiff's intestate to fence the track under the case as made in the complaint, must be determined as a matter of federal law aside from any statute of the State of Montana; and under all the federal decisions, and under the federal law there is no duty owing to an employee to fence the track; and hence, there being no federal or other duty, there can be no liability under the federal statute, or in the case as framed by the pleadings. As regards the Montana, so-called, fence statutes, they did not impose an absolute duty to fence, and by their terms, and by their restrictions, contained in the

titles to the legislative acts of Montana, the duty to fence is not one which inures to the benefit of employees, or for a violation of which a cause of action can arise in favor of an employee, or his administrator, to recover damages by reason of his injuries or death; and such statutes, moreover, can have no bearing in an action brought under said Federal law.

"Fourth. It appears from the complaint that the sole ground of negligence charged is a failure to fence the railroad track in question. By the Common Law, there was no duty resting upon defendant in favor of plaintiff's intestate to fence its track; and under the statutes of Montana, the original code did not create any duty to fence, but merely provided what fences should be erected by railroad companies if they did fence and left the option with the adjoining farm owners to determine whether there should be a fence, and did not embody any obligation except in the case of adjoining farm owners, only, who owned farms immediately adjoining the railroad track; and subsequent amendments by legislative enactment, by reason of the titles of such acts being limited to liability for stock killed, cannot create a duty to an employee or liability for the death of plaintiff's intestate, the title to such acts being insufficient to cover the case of damage to persons, or any damage or liability other than damage to or liability for stock, hence, as there is no legal duty owing to plaintiff's intestate, there cannot, in any event, be any negligence.

"Fifth. There is a fatal variance amounting to a failure of proof between the allegations of plaintiff's complaint, and the proof, which variance amounts also to a failure of proof, in that it appears from the complaint that this action is based upon the statute of the United States defining liability of railroads, while en-

gaged in inter-state commerce, to its employees, or their families while such employees are employed in such commerce; and it is alleged in the complaint that at the time plaintiff's intestate was killed, defendant was engaged in inter-state commerce, and that he was employed by defendant in such commerce; but the proof adduced in the case does not show or tend to show these allegations to be true; and, on the contrary shows that according to the proof, the defendant was not at the time engaged in intra-state commerce; that plaintiff's intestate, also, was not employed in such commerce, but that at said time defendant was engaged only in intra-state commerce, if in any commerce, and that plaintiff's intestate was employed, if in any commerce, only in intra-state commerce. The proof shows that the only work being done by the deceased was the loading of ties left on the right of way by contractors who had cut the same in the neighboring hills, and that these ties, as raw material, were to be sent to the tie-treating plant at Somers, where raw material was to be treated and manufactured into the finished product or tie, which finished product might or might not thereafter be used in commerce, interstate or otherwise, by defendant or anyone else, and especially that the same might be used only in the construction of new lines not owned or operated by defendant, and in fact not in operation, but owned or being constructed by different companies other than the defendant. The work done by plaintiff's intestate was not in any way connected with any commerce, but was at most preparatory to, or anterior to commerce later to be undertaken. The variance is also substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said cause to the federal court whereas, if the cause made by

the proof had been alleged, to-wit, an intrastate case, the cause could have been removed; and hence a refusal to recognize the variance will operate to deny to defendant a right under a statute or law of the United States, to-wit, the right to remove such a cause properly plead to the federal court, and a refusal to recognize such a variance permits the plaintiff to allege a cause of action under the laws of one sovereignty, to-wit, the United States, and to maintain or seek to prove a cause of action under the laws of another sovereignty, to-wit, the State of Montana.

"Sixth. It appears from the uncontradicted evidence in the case that even if the defendant was, under the Court's ruling, in any respect negligent in any of the matters complained of in the complaint, or in the matter of not fencing the track, this condition of the track, and the dangers, if any, incident thereto, should have been known to the plaintiff's intestate, and in fact actually were known to him; and upon the further ground that at the time he was injured he was backing his train, whereas, if he had, in accordance with proper railroad operation, according to the testimony, placed the engine at the head of his train, as the train moved toward Kalispell, the accident would have been avoided, and that he had, according to the testimony, a safe way of proceeding to-wit, by placing his engine at the east end of his train; and that therefore he assumed the risk of the conditions of which complaint is made in regard to the matter of fences, and in regard to the danger to be encountered from striking animals, and because of his choice of a dangerous, or at least more dangerous method of proceeding; it appears from the uncontradicted testimony that the work done by Mr. Hall lasted for at least some five days, from October 7th to October 11th, and that all the work which he did was done

in broad day light, and that in doing this work he was not simply running over the line from time to time, but most of the time his train was standing still, and it would be impossible under these circumstances and under other circumstances discovered by the evidence for him not to have observed the lack of fencing and the dangers, if any, which confronted him. And moreover the testimony is uncontradicted that this entire line west of Glacier Park Station is practically unfenced, and that he did much work for many years up on the main line, so that beyond question he knew of the unfenced condition of the line and therefore assumed the risk.

"This motion is based upon the complaint of the plaintiff and the records and files in this cause, and upon all of the testimony in the case."

The trial court was certainly not in error in denying these motions. The motion first interposed called for a dismissal of the action. The most that the defendant company could have asked for was to have the case transferred to the federal court. The complaint stated a cause of action under the federal liability law. If the federal liability law was ignored a cause of action was stated and proved under the state law. If an application was made to amend the complaint, by striking out the averment as to interstate commerce, the amendment would have been granted, and the trial would have proceeded. This court has so held in

Wabash Ry. Co. v. Hayes, 234 U. S. 86; 58 L. Ed 1226.

The most that the defendant company could have asked for under the circumstances was that the trial should be discontinued, and that the case should be transferred to the federal court on account of diverse citizenship.

Jones v. Chesapeake & Ohio Ry. Co. 149 S. W. 951.

This it did not do. More than that, at the time that the motion was presented, not only was the application made to dismiss the case because the proof showed that the deceased was not employed in interstate commerce at the time that he was killed, but the court was called upon to pass upon other matters which called for the exercise of jurisdiction on its part, which, when exercised, would prevent the transfer of the case. Supposing that the plaintiff in error was now urging that error was committed by reason of its being denied the right to transfer the case to the federal court, could it for a moment be successfully contended on the record before us, that this court could entertain its favorable consideration for a moment. Not only did the plaintiff in error present the question of variance, which would make possible the transfer of the case to the federal court, should it elect to so transfer the case, but it likewise presented for consideration questions affecting the merits of the action. The trial court was asked to grant a non-suit, and dis-

miss the action upon the merits, because the complaint didn't state a cause of action, and it was likewise asked to grant a non-suit, and to dismiss the action on the merits, because the testimony did not disclose negligent conduct on its part. Are we not right in urging, in the light of the present contention, that the motion was properly denied, and because of the variance complained of a petition should have been presented to have the case transferred to the Federal Court, because of diversity of citizenship. This court in the case of

> N. P. Ry. Co. v. Austin, 135 U. S. 315, 34 L.Ed. 218, said:
>
> "Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, * * * "

See likewise

> Chappell v. Bradshaw, 128 U. S. 132, 32 L. Ed. 369.

As we have already stated, the only way in which the plaintiff in error could be prejudiced by trying the case as if the federal statute applied was by its being deprived of the right to transfer the case to the federal court. The case could have been tried in the state court, even though it was removable, if the plaintiff in error did not see fit to have the case removed. When it made its motion, it should

have asked to have the case removed, and should not have asked the court to pass on questions which meant a final disposition of the case; and presenting the motion which it did, it is not now in a position to urge that the present judgment should be annulled.

Powers v. Ry. Co., *supra.*
Kan. Ry. v. Daughtry, 138 U. S. 298, 34 L.Ed. 963.
Ayers v. Watson, 113 U. S. 594, 28 L.Ed. 1093;
N. P. Ry. Co. v. Austin, *supra;*
Gerling, Admr. v. Baltimore & O. Ry. Co. 151 U. S. 673, 38 L.Ed. 311;
Chesapeake & O. Ry. Co. v. Dixon, 179 U. S. 131, 45 L.Ed. 121;
Lesh v. Bailey, 49 Ind. App. 254, 95 N. E. 341;
Dempster v. Ore. Short Line Ry. Co. 37 Mont. 335, 96 Pac. 717;
Golden v. N. P. Ry. Co. 39 Mont. 435, 104 Pac. 549;
Murphy v. Stone-Webster Eng. Corp., 44 Mont. 146, 119 Pac. 717.

Summarizing what we have said heretofore, plaintiff in error did not ask that the case should be transferred to the federal court. If this request was made, and the necessary steps taken to effectuate this, then its rights would have been protected and it would be in a situation to urge the error of which it now complains. Instead of doing so, it asked the trial court to say that a variance existed, because the proof showed that the deceased was not

injured while employed in interstate commerce. On account of this variance, it asked the trial court that the plaintiff at the trial should be non-suited, and that the action should be dismissed on its merits. It did not stop there. It also asked the court to exercise jurisdiction and pass upon the merits of the controversy, and hold that the complaint didn't state a cause of action, and that the proof didn't show that any negligent act was committed or done by it, and, by reason of that fact, to grant a non-suit and dismiss the action on the merits. In this way, it sought, through the exercise of jurisdiction by the state court, to finally dispose of the litigation. In other words, it put itself in a situation where it took a chance that the state court and the jury should try the case on the merits with a reserved purpose that, should it lose out, then it would urge that the lower court committed error in holding that the federal statute applied. It is well to bear in mind, too, that if the court denied the motion on the grounds suggested, except that the federal statute did not apply, no dismissal of the action under the decisions of this court would be ordered. The plaintiff in the court below could disregard the averment as to the federal statute, and could then proceed under the state law. It is true, thus acting the defendant company could then, if it so elected, have the case transferred to the

federal court. The situation which the record presents makes appropriate the following language of this court taken from the case of Rosenthal v. Coates, 148 U. S. 142, 37 L.Ed. 399:

> "Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the federal court. Here, Rosenthal has gone through the state trial and appellate courts, and his rights have been finally declared by the Supreme Court of the state; and though as yet no formal decree has been entered in the trial court, it is none the less true that he has experimented with the state courts and been beaten, and now seeks a different forum."

We respectfully submit that the contention of the plaintiff in error on this score is without merit.

WAS DECEDENT EMPLOYED IN INTERSTATE COMMERCE?

The decedent was running a construction train. Before getting on this branch line, his work was done on the main line. On the main line, he was hauling material for the up-keep of the road. On the branch line, he was collecting ties for the up-keep of the road. There would be no question at all about its being interstate commerce under the repeated adjudications of this court, if, at the time of the accident, the construction train had ties which were being distributed along the branch or along the main line to be put in by the trackmen.

We submit that the fact that they were to be first treated chemically and then put in does not remove the work from interstate commerce, so as to render inapplicable the federal statute.

In the case of

Louisville & Nashville R. R. Co. v. Parker, 242 U. S. 13, 61 L.Ed. 119,

this court said:

> "The business upon which the deceased was engaged at the moment was transferring an empty car from one switch track to another. This car was not moving in interstate commerce, and that fact was treated as conclusive by the court of appeals. In this the court was in error, for if, as there was strong evidence to show, and as the court seemed to assume, this movement was simply for the purpose of reaching and moving an interstate car, the purpose would control and the business would be interstate. The difference is marked between a mere expectation that the act done would be followed by other work of a different character, as in Illinois C. R. Co. v. Behrens, 233 U. S. 473, 478, 58 L.Ed. 1051 * * * and doing the act for the purpose of furthering the later work."

So, in this case, the purpose of collecting the ties was to use them ultimately in the maintenance of an interstate road, and the intermediate step of chemically treating the ties was not such an interruption of their use for the purpose intended as to destroy the interstate character of the work, for, as was stated in the case of

Shanks v. Del. L. & W. R. Co., 239 U. S. 556, 60 L.Ed. 436,

> " * * * the true test of employment in such commerce in the sense intended, is, Was the employee, at the time of the injury, engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

We submit that, applying this test, we are justified in asserting with confidence that the deceased was employed in interstate commerce when killed.

See, likewise,

Walsh v. N. Y. New Haven R. R. Co. 223 U. S. 1, 56 L.Ed. 327;
Norfolk & Western Ry. Co. v. Earnest, 229 U. S. 114, 57 L.Ed. 1096;
Pedersen v. Del. & L. W. R. Co., 229 U. S. 146, 57 L.Ed. 1125;
St. Louis S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L.Ed. 1129;
North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L.Ed. 591;
N. Y. C. & H. R. R. Co. v. Carr, 238 U. S. 260, 59 L.Ed. 1298;
Erie R. R. Co. v. Winfield, 244 U. S. 170, 61 L.Ed. 1057.

In Vol. 61, L.Ed., Supreme Court Reports, pages 319, 320, 321 and 322, will be found a grouping of cases under different headings, showing instances where employment in interstate commerce occurred.

FEDERAL NEGLIGENCE FROM FAILURE TO FENCE.

In this case, we are not concerned as to decisions having to do with fence laws. There is a fence law in Montana, but the basis of liability in the instant case has nothing to do with this fence law. The

basis of liability is the failure of the railway company to provide a reasonably safe place for its employes—a breach of common law duty.

And in this connection, it surely can be uncontradictedly asserted that if this railway branch line ran through a country where cattle were in the habit of getting on the railroad track, so as to endanger the safe running of trains and so as to endanger the lives of the operatives of such trains, and the fencing of the track would remove that danger or minimize it, the failure of the company to fence would be the breach of the common law duty referred to; and this is the ground of action in the instant case.

The Supreme Court of Montana, discussing the proposition as to whether or not the railway company was negligent in the case at bar, said (Alexander v. G. N. Ry. Co. 51 Mont. 574):

> "2. The negligence charged in the complaint is the failure of appellant to fence its track at and near the place where Hall was killed and thus to exclude cattle, the presence of which upon the track was likely to cause derailment of its trains, and in permitting its trains to be run over said track while the same was so unfenced. The questions raised upon the pleadings and the evidence are whether under any circumstances a railway company can owe any duty to its train operatives to shield them from whatever danger the presence of cattle upon its track may cause, by fencing such track; and, if so, whether facts sufficient were made to appear in this case to establish

prima facie the existence of such duty. The appellant vigorously denies that any such duty ever exists, while the respondent contends that such duty may exist and in the present instance did exist—not in virtue of the fencing statute of this state (Rev. Codes, sec. 4308), which was enacted for the benefit of stock owners (*Nixon* v. *Montana etc. Ry Co.*, 50 Mont. 95, 145 Pac. 8), but in virtue of appellant's common-law obligation to exercise ordinary care to furnish its employees with a reasonably safe place in which to work. As regards the general proposition, the authorities are by no means harmonious, but we think the better reasoning supports the respondent's position. Speaking broadly, the obligations of a railway to its employees are not different in principle from those of other masters to their servants, and when the place of work to which the servant is detailed is the track or roadway of the master, the duty to exercise reasonable diligence to keep it safe should and does arise. Indeed, little if any difficulty is found in the application of this rule where defects in the track or roadway or inanimate obstructions are involved, and we cannot see why any should arise from the mere fact that the obstruction is animate. 'Unless a railway track is fenced, cattle are liable to stray upon it from adjacent fields and commons; cattle upon a railway track are liable to get run over by trains notwithstanding the vigilance of the engineer and other trainmen; engines and trains are frequently derailed by running over cattle upon the track; in such derailments trainmen are frequently killed or injured. These propositions of fact, which are abundantly borne out by the judicial reports, argue a duty upon the part of railroad companies toward their own employees of fencing their tracks so as to keep out trespassing animals.' (4 Thompson on Negligence, sec. 4319.) In *Donnegan* v. *Er-*

hardt, 119 N. Y. 468, 7 L.R.A. 527, 23 N. E. 1051, the New York court of appeals considering the case of a trainman who had been injured through the collision of his train with a horse and whose judgment against the railroad company had been reversed by the General Term upon the ground that the only responsibility of a railroad company for defective fences is that mentioned in the statute, and that at common law, independently of statute, a railroad company would not have been liable for injuries sustained by him said: 'We think the learned General Term fell into error. A railroad company, for the safety of its passengers as well as its employees upon its engines and cars, is bound to use suitable care and skill in furnishing, not only adequate engines and cars, but also a safe and proper track and roadbed. The track must be properly laid, and the roadbed properly constructed, and reasonable prudence and care must be exercised in keeping the track free from obstructions, animate and inanimate; and if, from want of proper care, such obstructions are permitted to be or come upon the track, and a train is thereby wrecked, and any person thereon is injured, the railroad company, upon plain common-law principles, must be held responsible. Experience shows that animals may stray upon a railroad track, and that, if they do, there is danger that a train may come in collision with them and be wrecked; and adequate measures, reasonable in their nature, must be taken to guard against such danger. Independently of any statutory requirement, a jury might find upon the facts of a case that it was the duty of a railroad company to fence its track to guard against such danger.' (See, also, *Dickson* v. *Omaha & St. L. Ry. Co.*, 124 Mo. 140, 46 Am. St. Rep. 429, 25 L.R.A. 320, 27 S. W. 476; *International & G. N. Ry. Co.* v. *Thompson*, 34 Tex. Civ. App. 67, 77 S. W. 439; *Fordyce, et al.*

v. *Jackson*, 56 Ark. 594, 20 S. W. 528; *Lackawanna etc. Ry. Co.* v. *Chenowith*, 52 Pa. St. 382, 91 Am. Dec. 168; *Sullivan* v. *Philadelphia & R. Co.*, 30 Pa. 234, 72 Am. Dec. 698.)

"Nor are all the cases cited by appellant really opposed to this conclusion. Some of them are not in point, and in most of the others the judicial mind seems to have been occupied with the notion of absolute duty to fence independently of statute. To be sure, there is no such duty. Whether, in the absence of statute, a railway company ought to fence its tracks at all, and where it ought to fence, depends, so far as its employees are concerned, upon the existence of circumstances from which it may be said that without such precautions due care has not been exercised. In the present case, however, we know that cattle are permitted to run at large in this state; it is conceded that appellant's track is not and never has been fenced, and it is not disputed that fencing is the device commonly employed to effect the exclusion of cattle; there is evidence to show that some public domain exists in the neighborhood of the accident, and from it there is unobstructed access to the appellant's right of way and track, that cattle abound in the adjacent country and commonly run at large, that they frequent the vicinity of the accident, attracted by the water supply, that they often come upon the track, that encounters between them and moving trains were not unusual, that they are, potentially at least, a source of danger to such trains, and that all this was known to the appellant prior to the time of the accident. Under such conditions the failure to fence so as to keep out cattle, the consequent straying of the cow upon the track, the consequent running over the cow while on the track and the consequent derailment of decedent's train, resulting in his death, form a collection of facts which plainly constitute evidence of negligence,

making a question for the determination of the jury."

This court, in a general way, considered the use of fences for the protection of persons likely to go upon railroad tracks, in the case of

Hayes v. Michigan Central Ry. Co. 111 U. S. 228, 28, L.Ed. 410.

The doctrine was declared that the master owed the duty to his servant to provide him a reasonably safe place to work, with reference to the character of the employment in which the servant is engaged.

And in the case of

Northern Pacific Ry Co. v. Peterson, 162 U. S. 346, 40 L.Ed. 994,

this court said that the master was bound to furnish such machinery and apparatus as were adequate and suitable, and to keep and maintain them in such condition as to be reasonably safe for use.

See likewise

Union Pac. Ry. Co. v. McDonald, 152 U. S. 262, 38 L.Ed. 434;
Union Pac. Ry. Co. v. O'Brien, 161 U. S. 451, 40 L.Ed. 766;
Choctaw O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L.Ed. 96;
Texas & P. Ry. Co. v. Swearingen, 196 U. S. 51, 49 L.Ed. 382;
N. Y. C. & H. R. R. Co. v. Price, 159 Fed. 330.

Reference is made by designation to the negligence under consideration as being federal negligence, as if negligence under the federal law were something different from negligence under the state law or at

common law. The negligence referred to in the federal act is the negligence which is established through the recognition of common law principles.

We quote as follows from the case of

Cincinnati, New Orleans & Tex. Ry. Co. v. Fannie Eastham, Adm'x, 169 S. W. 886, L. R. A. 1915 C (55 L. R. A. [N. S.]) 27, at page 30.

"It will be noticed that the Federal act under which this action was brought does not undertake to define the character or degree of negligence necessary to a recovery. This being so, we think that when an action is brought under the Federal act in our state courts to recover damages for injuries suffered on account of the negligence of another employee, the rules of law prevailing in this state must be looked to in determining whether the acts or omissions complained of amount to negligence. There is no difference in cases like this in the character or degree of negligence necessary to sustain a verdict and judgment, whether the action be brought under the Federal or state law. The negligence which would authorize a recovery under one would authorize it under the other, and if the evidence is not sufficient to sustain a recovery under one, neither will it be sufficient to sustain it under the other."

ASSUMPTION OF RISK.

It is contended that Mr. Hall assumed the risk of any injury which the absence of the fence might occasion. This proposition brings up for consideration the defense of assumed risk affirmatively pleaded. It is well to bear in mind that Mr. Hall had but a brief acquaintanceship, so far as the record

discloses, with this branch line, and as to whether he knew that it was fenced or not, the record is silent. The only evidence disclosed by the record bearing on this question is that on two occasions cattle were on the track. Before taking up the evidence as to this, we might set forth the law on the subject as it is declared by the courts.

In the case of

O'Brien v. Corra-Rock Island Min. Co., 40 Mont. 212, 105 Pac. 724,

this court said (Montana report, page 228):

> "The court was also asked to charge the jury that if it was found from the evidence that O'Brien knew, or by the exercise of ordinary diligence might have known, that dynamite was kept in the new magazine, then he assumed the risk incident to working at the place where he was working at the time of the explosion. This requested instruction was properly refused. It ignores the element of appreciation of the risk, which is essential to charge one with the assumption of a risk. In *Hollingsworth* v. *Davis-Daly Estates Copper Co.*, 38 Mont. 143, 99 Pac. 142, this court reiterated the rule obtaining in this state, as follows: 'As the servant owes no duty to the master with regard to the place of employment, but is chargeable with the duty of performing his work, the question, in cases like this, is not whether he had equal means with the master of knowing the conditions which existed, but whether, in the light of all the surrounding circumstances, he appreciated the danger. (*Stephens* v. *Elliott*, 36 Mont. 92, 92 Pac. 45; *Forquer* v. *Slater Brick Co.*, 37 Mont. 426, 97 Pac. 843; *Hardesty* v. *Largey Lumber Co.*, 34 Mont. 151, 86 Pac. 29.)' "

In the case of

Tuckett v. American Steam and Hand Laundry, 30 Utah 273, 84 Pac. 500, 116 Am. St. Rep. 832,

the Supreme Court of Utah announced the rule in the following language (84 Pac. p. 505):

"'It is also insisted for the appellant that the injury which the plaintiff sustained was incident to his employment, and that he assumed the risk. The mere fact that the respondent was aware that the cage was shaking, and not running smoothly, is not sufficient to justify us in holding that he had assumed the risk, and there is no evidence to show that the defects were of such an obviously dangerous character that he ought to have appreciated the risk, and ceased his employment, or that a man of reasonable precaution, placed under similar circumstances, would have done so. It is shown that the plaintiff was not skilled in mechanic arts, had never worked in a machine-shop, and never had anything to do with machinery, except in this mine. Therefore he had the right to rely, at least to a reasonable extent, on the judgment of his employer, who is presumed to have a knowledge of the machinery used in his business, and to assume that he would discharge his duty by furnishing reasonably safe machinery, and keeping it in proper condition and repair. Where an employe has knowledge of defects in machinery used in his employment, and the defects are not so dangerous as to threaten immediate injury, or the danger is not such as to be reasonably apprehended by him, his continuance in the service will not defeat a recovery for injuries resulting from such defects. If, however, the defects are so obviously and immediately dangerous that a person of ordinary prudence and precaution would refuse to use the

machinery, then, if the servant continues its use, he assumes the risk. We think it was a question for the jury to determine whether, under all the circumstances in evidence in this case, the employe by continuing in his employment with knowledge of the defects, assumed the risk of the injury which he sustained. "Mere knowledge of the defect is not sufficient, unless it does or should carry to a servant's mind the danger from which he suffered. A servant may assume that the master will do his duty; and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he ordinarily will be justified in obeying orders, subject to the qualification that he must not rashly or deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. It is one thing to be aware of defects, and another to know and appreciate the risks resulting therefrom". Thomas, Neg. p. 851. In Patterson v. Railroad Co. 76 Pa. 383, 18 Am. Rep. 412, Mr. Justice Gordon, delivering the opinion of the court, said: "In this discussion, however, we are not to forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such cases the law adjudges the servant guilty of concurrent negligence, and will refuse that aid to which he would otherwise be entitled. But where the servant, in obedience to the requirements of the master, incurs the risk of machinery, which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the rule is different. In such case the master

is liable for a resulting accident.'" "

In

Lee v. Southern Pac. R. R. Co., 101 Cal. 118, 35 Pac. 572,

the Supreme Court of California, respecting the risk of an employe said (35 Pac. 573):

> "It is not only necessary that an employe should know of the defect in the machinery, in order to hold that he assumed the risk, but the danger arising from the defect must also be known or reasonably apprehended by him."

And in the case of

N. P. Ry. Co. v. Herbert, 116 U. S. 642, 29 L.Ed. 755,

this court, speaking through Mr. Justice Field, said (29 L.Ed. p. 758):

> "The servant does not undertake to incur the risks arising from the want of sufficient and skillful colaborers, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him. This doctrine has been so frequently asserted by courts of the highest character, that it can hardly be considered as any longer open to serious question."

In the case of

Gila Valley, G. & N. R. Co. v. Hall, 232 U. S. 94, 58 L.Ed. 521,

this court covered this field so clearly and fully that really further citation of authorities covering this subject might be dispensed with. The court said (58 L.Ed. p. 524):

"The motion for direction of a verdict seems to have been rested upon the additional ground that the alleged defect was so obvious that its existence must have been known to the plaintiff, and that he therefore assumed the risk. There was no direct evidence that he knew of the defect, and it does not appear to have been a part of his duties to inspect the machine or the wheel, or to look after their condition. He had been employed for only three or four days in work that required him to ride upon the car, and at the utmost it was a question for the jury whether the defective condition of the wheel was so patent that he should be presumed to have known of it. And then, the question whether the defect was such as to render the use of the car dangerous was in dispute at the trial; hence, it could not be properly held that the risk was indisputably obvious, even to one who knew of the defect. It is quite clear, therefore, that a verdict could not properly have been directed in favor of the defendant upon the ground that the plaintiff, in using the car, had assumed an obvious risk.

"There was a request for instructions to the effect that the plaintiff assumed the risk of injury from defects which he knew, or by the exercise of ordinary care in the discharge of his duties might have known, or which he had opportunity to know. These instructions the court refused to give, but charged the jury upon this question:

" 'The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dan-

gers incident to the use of such appliances.' This, we think, was a correct instruction under the circumstances of the case. An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. Union P. R. Co. v. O'Brien, 161 U. S. 451, 457, 40 L.Ed. 766, 770, 16 Sup. Ct. Rep. 618; Texas & P. R. Co. v. Archibald, 170 U. S. 665, 671, 42 L.Ed. 1188, 1191, 18 Sup. Ct. Rep. 777; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L.Ed. 96, 100, 24 Sup. Ct. Rep. 24; Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 62, 49 L.Ed. 382, 387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; Burns v. Delaware & A. Teleg. & Teleph. Co. 70 N. J. L. 745, 752, 67 L. R. A. 956, 59 Atl. 220, 592, 17 Am. Neg. Rep. 673."

See likewise:

Millen v. Pacific Bridge Co., 51 Ore. 538, 95 Pac. 196;

Rummell v. Dillworth, Porter Co., 131 Pa. 509, 19 Atl. 345;

Burnside v. Peterson, 43 Colo. 382, 96 Pac. 256; 17 L. R. A. (New Series) 76.

Now, as to the evidence:

Mr. Alexander testified that the country through which this branch line ran was a cattle country; that there was no natural barrier which would prevent cattle from getting on the track; that there was nothing to prevent cattle from going on the track at any time, and that he had seen cattle on the track. (Tr. p. 13).

Robert McCauley, an employe of the company, testified that they commenced working on the branch line west of Kalispell about the 6th or 7th of October (Tr. p. 16). This, likewise, was the testimony of Mr. Stevens, another employe.

Robert Booth testifed that the country around Batavia and Kila was thickly settled; that there were a good many horses and cattle there; that there was a stream of water in that neighborhood which crossed the track and ran for some distance along the highway; that this water had been used considerably by cattle in that neighborhood for watering purposes, and that there was no other water in that neighborhood available for that use. (Tr. p. 33). That stock and cattle getting on the track was a frequent occurrence, and that sometimes the cattle would leave the right of way and get between the rails; that there were times when

cattle weren't on the track; that the cattle that would be around there came from the mountains, from the range, down to the water and from some neighbors who lived in that part of the country; that these conditions existed during the entire summer months and for more than a year preceding the month of October, 1911. (Tr. p. 33).

Testimony was likewise to the effect that cattle on the track were likely to derail trains. (Testimony of Mr. McCauley, Tr. p. 17 and Mr. Stevens, Tr. p. 25).

As to the knowledge of these conditions and as to the danger attendant upon the operation of trains by reason of the absence of a fence, Mr. Rae, who was a brakeman on the train, testifed that the decedent told him to watch the air and that he would ride the platform and look out for stock. (Tr. pp. 43-44).

It might be stated, parenthetically, that the witness in question mentioned this fact when on the stand, and that in an affidavit theretofore made by him, no mention was made of this conversation. Mr. Stevens, the engineer, stated that in going to work from Kalispell, they were compelled to stop the train once on account of stock getting on the track; that the whistle was blown at that time, and that the stock were driven off; that this occurred where the county road ran along the track

near Batavia station; that the decedent was on the train that morning when they started out from Kalispell. This witness likewise testifed about seeing cattle grazing along the public road at one time when cars were taken from where they were loaded and placed on the siding. (Tr. p. 62).

So far as the record discloses, the only evidence that exists on which the assumption of risk rests is this instance where the train was brought to a standstill, as testified to by Mr. Stevens, and the instance referred to by him when he noticed some cattle grazing on the public highway, and the statement alleged to have been made to Rae by the deceased when returning to Kalispell, on the evening of the accident.

So far as the record discloses, these incidents might have all transpired on the day that the decedent was killed. The burden, as to this issue, was upon the defendant company. We insist that the evidence falls far short of showing that the decedent knew that the right of way was not fenced, or that the decedent appreciated, under the conditions existing in that territory, the risk which the absence of the fence created. The courts universally hold that the employe may rest secure in the belief that the master has provided for him a reasonably safe place to work. He is not required to institute inquiries as to whether this has been done.

It is only when the fact confronts him in the performance of his duty that the master has been derelict in this respect that he assumes the risk which the master's failure of duty has brought about. It is well to bear in mind in this connection that the preliminary duty rested upon the company to provide for the decedent a reasonably safe track. He was being sent from place to place with his construction train collecting ties. He was justified in assuming that if any extraordinary risks attended the operation of his train at those places to which he was sent, he would be advised as to their existence..

In the case of

Killeen v. Barnes-King Development Co., 46 Mont. 212, 127 Pac. 89,

it was urged, as is urged here, that opportunity was afforded to notice the conditions which rendered the place dangerous. In the light of that contention, the court said (46 Mont. 217):

> "The contention of appellant is that for more than a week the plaintiff was working about the collar of the shaft; that the block or bumper was in plain sight; that plaintiff in fact saw it frequently; that at least he is chargeable with knowledge of its worn condition; that he must have appreciated the danger from its continued use; that he failed to complain, and therefore must be held to have assumed the risk. The evidence discloses that plaintiff had seen the bumper a number of times, but he did not know how thick it was, how high it pro-

jected above the rail, or whether it was over one rail or over both rails. He testified that he had confidence in the defendant; that he did not have any idea the car would go over the bumper; that he had never noticed that the flange of the car wheel had cut a groove in the bumper at all; and that there was any danger from using the bumper had never entered his mind. So frequently has the question of assumption of risk arisen, that the principles of law controlling the doctrine have become well settled, and with respect to them there is little, if any, contrariety of opinion. The only difficulty arises in applying them to a given state of facts."

In the case of

Terre Haute & I. Ry. Co. v. Williams, 172 Ill. 379, 50 N. E. 116,

the identical proposition now discussed was under consideration, and the court said (p.117):

"It is, however, contended that the deceased assumed the risk arising from the failure of the railroad company to fence its track and construct cattle guards at the place in question, because he knew that the track was not fenced and the cattle guard was not constructed, and yet continued in the service of the railroad company without objection. A railroad company is required to use reasonable and ordinary care and diligence in procuring suitable and safe machinery and appliances for its employes, and if an employe is injured through the failure of the railroad company to discharge the duty imposed upon it the company will be liable. Where, however, the employe continues to work with machinery or other appliances furnished by the employer after he has knowledge of its defective condition, as a general rule he will be deemed to have as-

sumed the risk of such defects when he has not been led by the employer to believe that the defects would be remedied. Manufacturing Co. v. Ballou, 71 Ill. 417. Here the accident occurred before daylight, at about 4:30 o'clock in the morning. It is not suggested that the negligence of the engineer in the management or running of the train contributed to the injury, but it is contended, from the fact that the engineer had run over the road two or three times a week for three years and had often stopped at Tabor for the purpose of switching cars, he must have known that the road was not fenced, and that the cattle guards were not constructed. The run of the engineer was from Terre Haute to Peoria—a distance of about 175 miles. It does not appear, from the evidence, that the deceased knew of the defects complained of, nor does it appear that there was anything in the nature of the duties of the deceased which would convey to him information in regard to the condition of the fence or cattle guard. It is no doubt the duty of an engineer, in the management of his train, to look out and look ahead for obstructions or signals, and to look out for signals when switching, as suggested in the argument of appellee; but, so far as appears, there is nothing in the nature or character of the duties of an engineer which would direct his attention to the fences along the line of the track or the cattle guards at a highway crossing. It is therefore unreasonable to believe that the engineer had notice of the condition of the fence and cattle guards at the place where the accident occurred. It was held in Railroad Co. v. Johnson, 116 Ill. 206, 4 N. E. 381, that the law does not require that a brakeman on a freight train should know all the defects of construction and obstructions there may be along the line of the railroad. For a like reason it may properly be said that an engineer

is not required to know the condition of the fences or cattle guards along the line of the road. See, also, Railroad Co. v. Sanders, 166 Ill. 270, 46 N. E. 799. The duty of fencing the track and constructing cattle guards at highway crossings was imposed upon the railroad company, and the deceased had the right to believe that the railroad company had discharged its duty in this regard; hence there was no reason why he should be on the constant watch to learn the condition of the fences and cattle guards."

And in the case of

Magee v. North Pacific C. R. Co., 78 Cal. 430, 21 Pac. 114,

the court said (p. 115):

"Conceding that the evidence shows that plaintiff knew of the preposterous manner in which the train upon which he was injured was operated, and knew that cattle had previously intruded upon the track, it does not, in our opinion, follow that a non-suit should have been granted. The right of a servant to recover on account of the master's negligence is not affected by notice of any defects other than such as the servant ought in the exercise of ordinary prudence to have forseen might endanger his safety. 1 Shear. & R. Neg. § 214; Dale v. Railroad Co., 63 Mo. 455; Mehan v. Railroad Corp., 73 N. Y. 585. It has been expressly held that mere continuance of a servant in his work in the face of a known danger only raises a question for the jury. McMahon v. Iron Co., 24 Hun. 48; Hawley v. Railroad Co., 17 Hun. 115, 82 N. Y. 370. In fact, judgment for damages have been sustained in many cases where the servant had knowledge of the particular defect or danger which resulted in his injury. Clarke v. Holmes, reported in 2 Seymour, Neg. 953; Fairbank v.

Haentzsche, 73 Ill. 236; Dorsey v. Phillips, 42 Wis. 583. In Clarke v. Holmes, supra, COCKBURN, C. J., said: 'But the question whether the injury of which plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff had any share in bringing it about, is one wholly for the jury.' The motion for nonsuit was properly overruled.

"Consistently with the views above expressed we cannot disturb the order denying the motion for a new trial. There is no evidence that the plaintiff knew of the particular defect or danger which resulted in his injury. He knew that cattle had previously been on the track, but he did not know that effective measures had not been taken before the occurrence of which he complains to prevent their coming on. We think he had a right to assume that such measures had been taken as would prevent the recurrence of that danger. At least there was evidence to justify the jury in finding that he had no knowledge of the particular defect or danger which resulted in his injury. In Trask v. Railroad Co., 63 Cal. 96, where a train hand was injured and the court found that the injury was caused by the unskillful, improper, and negligent manner in which the defendant constructed its road, it was held that 'the plaintiff did not assume the risk arising from the unskillful, improper, and negligent manner in which defendant's road was constructed.' 'It has been often said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the

master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire. A servant is chargeable with actual notice as to matters concerning which it was his duty to inquire, and especially should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known of something which he did not actually know.' 1 Shear. & R. Neg. § 217. We think that rule fairly deducible from a majority of the cases in which the question was involved. There are cases, however, to the contrary, at least, seemingly so, among which is Sweeney v. Railroad Co., 57 Cal. 15, in which it was held that a new trial was properly granted on the ground of insufficiency of the evidence to justify the verdict; because 'from the testimony of the plaintiff's witnesses, and as the case stood when plaintiff rested, it would hardly be rational to deny that the deceased had known for months, indeed years, before the accident which caused his death, that the road at and for miles each side of the point where the collision occurred was not protected by fences and cattle-guards; and being an intelligent, reasonable human being, and engaged constantly as a locomotive engineer over this particular portion of the road, he must be deemed to have known that cattle were likely to intrude upon the track, and that thereby there was danger of just such an accident as resulted in his death.' In that case the motion for a new trial was granted; in this case it was denied. In that case it does not appear that the road had ever been fenced,—a fact of which an employe might more reasonably be supposed to take notice than of the fact that there was a

> defect in an existing fence. And a very large discretion has been accorded to trial courts in the matter of granting or refusing new trials in this state. But we will not attempt to parry the force of that decision by suggesting a distinction which is not obvious. The principle upon which the court proceeded in that case is not, in our opinion, supported by the weight of authority, and does not commend itself to our favorable consideration. We think the question of the plaintiff's knowledge of the danger to which he was exposed by reason of the omission to fence the road was one for the jury."

It is useless to add to what is so forcibly expressed in the decisions from which we quote the extracts presented. When it is remembered that the decedent had been on this particular branch line only from the 7th to the 11th, that he had never been on there before (so far as the record discloses) and, outside of a day or so longer, might never thereafter operate a train upon that branch line, that he was charged with no duty as to inspecting fences and was under no obligation to ascertain whether any existed, that there was no evidence (except inferentially) that he knew that an animal ever got upon this track, and, just because he operated that train upon its return trip to Kalispell on the evening of his death, exercising the precaution that he did, can it be consistently urged that the doctrine of assumption of risk applies in this case to bar a recovery? We confidently say no, and respectfully

insist that on the facts presented, recovery cannot be defeated on that ground.

DISMISSAL OF WRIT OF ERROR FOR WANT OF JURISDICTION.

This court is without jurisdiction to hear this controversy. The law authorizing a review by this court, on writ of error, provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had (where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity, or where any title, right, privilege or immunity is claimed under the constitution or any treaty or statute of, or commission or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such condition, treaty, statute, commission or authority), may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

Sec. 709 Revised Statutes of the United States.

The decision of the Supreme Court of the State of Montana favored the contention of the plaintiff in error in holding that the decedent was not engaged in interstate commerce when he was killed. It held likewise agreeably to the contention of the plaintiff in error that a variance existed between the allegations of the complaint and the proof. It held, however, as already stated, that the plaintiff in error was not prejudiced by reason of this variance. In the trial court, the plaintiff in error did not, on the score of diverse citizenship, ask to have the case transferred to the Federal Court. That right was never demanded and never denied. This court does not now know, from the record before it, if it reverses the judgment and orders a retrial, that the plaintiff in error upon such retrial will ask for a removal of the case to the Federal Court. The statute under consideration is explicit in declaring that the right or privilege to which it refers must be specially set up and claimed, and the decision of the highest court to which the question might be presented should be against the assertion of such a right or title. At the risk of repetition, we say that the plaintiff in error asserted the claim in the Supreme Court of Montana that the decedent at the time of the accident was not engaged in interstate commerce, and that tribunal coincided with that view. It likewise asserted that there was a vari-

ance, and the Supreme Court so declared. In both instances, the decision of the Supreme Court favored its contention. That tribunal stated, however, that while there was a variance, and while the trial court erred in holding differently, such error was non-prejudicial. Under the decisions of this court to which we have referred already, this court has held that because a case governed by the Federal Liability Law is tried under the state law, or because a case governed by the state law is tried under the Federal Liability Law, this, of itself, will not justify a reversal of the case, and that to authorize a reversal, the party complaining must show prejudice by such procedure. We have already shown, however, that in trying the case under the Federal law, the plaintiff in error secured an advantage rather than suffered a disadvantage. It is true that if the Federal law was not held applicable, the plaintiff in error might, if it elected so to do, have transferred the case to the Federal Court, but in that connection, we might say that it never asked at any stage of the proceedings to have the case so transferred, and there never has been thus far a ruling adverse to it in the assertion of such a right.

A judgment cannot be reversed on the ground that a right, title, privilege or immunity secured by the Federal constitution or by statute of the

United States is denied, where it does not appear on the face of the record that such right, title, privilege or immunity is specially set up or claimed in the state court.

Home for Incurables v. City of New York, 187 U. S. 155, 47 L.Ed. 117;
French v. Hopkins, 124 U. S. 524, 31 L.Ed. 536.

A Federal right, privilege or immunity is not specially set up or claimed, where it is not suggested that defendant in insisting on certain propositions, is relying on such right, privilege or immunity, and the state court does not pass upon such question.

El Paso and S. W. Ry. Co. v. Eichel and Weikel, 226 U. S. 590, 57 L.Ed. 369.

We submit, therefore, that as the record stands, no Federal question is involved, and there should be a dismissal of the writ of error.

Should the court hold, however, that the writ of error should not be dismissed, then we contend on the facts and on the law applicable to the facts, the judgment should be affirmed.

Respectfully submitted,

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C. B. Nolan,
of counsel

GREAT NORTHERN RAILWAY COMPANY *v.* ALEXANDER, ADMINISTRATOR OF HALL.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 130. Argued January 15, 1918.—Decided March 4, 1918.

A case arising under the Federal Employers' Liability Act between citizens of different States is not removable from a state to a federal District Court on either ground.

In the absence of a fraudulent purpose to defeat removal, the status, with respect to removability, of a case alleged to be one arising under the Federal Employers' Liability Act depends not upon what the defendant may allege or prove or what the court may, after hearing

upon the merits, *in invitum* order, but solely upon the form which the plaintiff voluntarily gives to his pleadings initially and as the case progresses.

Therefore, where the complaint states a cause under the Federal Act, the failure of the plaintiff to prove that the employee was engaged in interstate commerce when injured will not leave the case removable because of diverse citizenship appearing in the complaint. A contention to the contrary is not a claim of federal right of sufficient substance to afford this court jurisdiction to review a state court's judgment.

Writ of error to review 51 Montana, 565, dismissed.

THE case is stated in the opinion.

Mr. I. Parker Veazey, Jr., with whom *Mr. E. C. Lindley* was on the brief, for plaintiff in error.

Mr. C. B. Nolan for defendant in error.

MR. JUSTICE CLARKE delivered the opinion of the court.

This case presents for decision the question whether the non-removable case stated in the complaint became one subject to removal when the plaintiff rested his case and, as the defendant claimed, it became apparent that the allegation of the complaint that the deceased was employed in interstate commerce when killed was not sustained by the evidence.

We shall designate the parties as they were in the trial court, the defendant in error as plaintiff and the plaintiff in error as defendant.

The suit was commenced in a district court of Montana and is one to recover damages for wrongful death. The plaintiff was a citizen of Montana when the case was commenced and he alleges in his complaint, that the defendant was an interstate carrier, organized under the laws of the State of Minnesota at the time the accident occurred; that the deceased was a conductor employed by

the defendant in interstate commerce at the time he was killed, and that the proximate cause of the accident was the failure of defendant to fence its line, which resulted in the derailing of the car on which plaintiff's decedent was employed, causing his instant death.

The defense is a denial that deceased was employed in interstate commerce when injured, and a denial of negligence in the failure to fence, with a plea of assumption of risk.

When the plaintiff rested his case the defendant "moved for a judgment of non-suit and dismissal upon the merits," . . . "based upon the complaint of the plaintiff and upon the testimony adduced."

This motion asserted in various forms that the evidence introduced failed to show any actionable negligence on the part of the defendant and concluded with a fifth paragraph, alleging, in substance, as follows:

That there was a fatal variance, amounting to failure of proof, between the allegation of the complaint that the deceased was employed in interstate commerce at the time he was injured and the evidence introduced; . . . that, this variance is substantial in that, with the complaint charging that the deceased was killed while engaged in interstate commerce, the defendant could not remove said case to the federal court, whereas if the case as made by the proof had been made, to wit, an intrastate case, it could have been removed; and hence the failure to recognize the variance would operate to deny to the defendant a right under a statute or law of the United States, to wit, the right to remove such a case properly pleaded to the federal court.

The trial court having overruled this motion, the defendant introduced its evidence in defense and after the plaintiff's rebuttal was concluded renewed its motion, which was again denied, the defendant reserving its exception, and thereupon the case was submitted to the jury

and judgment was entered on the verdict in favor of the plaintiff.

On review the Supreme Court of Montana held that the trial court had erred, and should have ruled that on the evidence adduced the deceased was not employed in interstate commerce when injured, but holding that the defendant had waived its right to remove by failing to file a petition for removal, as required by law, the court went forward and held that a case of negligence at common law was stated in the complaint, and that the evidence introduced justified the trial court in submitting the case to the jury, and that the judgment must be affirmed.

In disposing of the question presented by this motion for "non-suit and dismissal" which we are considering, the Supreme Court of Montana said:

"We recall but one respect in which a defendant can be seriously prejudiced in such a situation, and that is where, by reason of diverse citizenship, removal of the cause to the federal court might be in order. In such a situation, however, the defendant must assert its right, under penalty of waiver, by filing a petition to remove at the first opportunity. . . . This the appellant did not do; instead, and with the knowledge of its right to have the cause removed, it submitted to the jurisdiction of the state court in which the trial occurred, by seeking a dismissal for variance as well as for failure to show the breach by it of any legal duty to the decedent under either state or federal law."

No claim is made that the allegation that the plaintiff's decedent was employed in interstate commerce was incorporated into the complaint fraudulently or in bad faith, for the purpose of defeating the right of the defendant to remove the case to the federal court.

The claim now made in this court by the defendant is that the state Supreme Court correctly held that the evidence introduced failed to show that the deceased was

employed in interstate commerce when he was injured, but that it committed reversible error and denied to the defendant the federal right to remove the case when it held that the right to remove had been waived, and affirmed the judgment instead of reversing and remanding the case to the lower court for further proceedings.

The plaintiff replies to this claim with the contention that the court is without jurisdiction to review the decision of the state Supreme Court for the reason that no federal right was denied to the plaintiff in error at any stage of the proceeding in the state court.

It is, of course, familiar law that the right of removal being statutory, a suit commenced in a state court must remain there until cause is shown for its transfer under some act of Congress (*Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199; Jud. Code, Chap. 3, §§ 28, 39).

The allegation of the complaint that the deceased was employed in interstate commerce when injured brought the case within the scope of the Federal Employers' Liability Act, and it would have been removable either for diversity of citizenship or as a case arising under a law of the United States, except for the prohibition against removal contained in the amendment to the act, approved April 5, 1910, 36 Stat. 291. But this allegation rendered the case, at the time it was commenced, clearly not removable on either ground (*Kansas City Southern Ry. Co.* v. *Leslie*, 238 U. S. 599; *Southern Ry. Co.* v. *Lloyd*, 239 U. S. 496).

The removal provisions of the Judicial Code, Chapter 3, §§ 28 to 39, inclusive, in effect when this case was tried, were substantially the same as they have been since the Removal Act of 1888 was passed, and that a case not removable when commenced may afterwards become removable is settled by *Ayers* v. *Watson*, 113 U. S. 594; *Martin's Administrator* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 688, 691; *Powers* v. *Chesapeake & Ohio Ry. Co.*,

169 U. S. 92, and *Fritzlen* v. *Boatmen's Bank*, 212 U. S. 364. Under the doctrine of these cases the defendant, admitting the non-removable character of the case at bar when it was commenced, argues that the failure of the plaintiff to prove his allegation that the deceased was employed in interstate commerce when he was injured, left the complaint as if the allegation had not been incorporated into it, and that therefore the case became removable for diversity of citizenship when the plaintiff rested his case.

But unfortunately for the validity of this contention it has been frequently decided by this court that whether a case arising, as this one does, under a law of the United States is removable or not, when it is commenced (there being no claim of fraudulent attempt to evade removal,) is to be determined by the allegations of the complaint or petition and that if the case is not then removable it cannot be made removable by any statement in the petition for removal or in subsequent pleadings by the defendant. *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454; *Chappell* v. *Waterworth*, 155 U. S. 102; *Texas & Pacific Ry. Co.* v. *Cody*, 166 U. S. 606; *Taylor* v. *Anderson*, 234 U. S. 74.

It is also settled that a case, arising under the laws of the United States, non-removable on the complaint, when commenced, cannot be converted into a removable one by evidence of the defendant or by an order of the court upon any issue tried upon the merits, but that such conversion can only be accomplished by the voluntary amendment of his pleadings by the plaintiff or, where the case is not removable because of joinder of defendants, by the voluntary dismissal or nonsuit by him of a party or of parties defendant. *Kansas City &c. Ry. Co.* v. *Herman*, 187 U. S. 63; *Alabama Great Southern Ry. Co.* v. *Thompson*, 200 U. S. 206; *Lathrop, Shea & Henwood Co.* v. *Interior Construction Co.*, 215 U. S. 246; *American Car & Foundry Co.* v. *Kettelhake*, 236 U. S. 311.

The obvious principle of these decisions is that, in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case, arising under a law of the United States, when it is commenced, and that this power to determine the removability of his case continues with the plaintiff throughout the litigation, so that whether such a case non-removable when commenced shall afterwards become removable depends not upon what the defendant may allege or prove or what the court may, after hearing upon the merits, *in invitum*, order, but solely upon the form which the plaintiff by his voluntary action shall give to the pleadings in the case as it progresses towards a conclusion.

The result of the application of this principle to the case at bar is not doubtful.

The plaintiff did not at any time admit that he had failed to prove the allegation that the deceased was employed in interstate commerce when injured, and he did not amend his complaint, but, on the contrary, he has contended at every stage of the case and in his brief in this court still contends that the allegation was supported by the evidence. The first holding to the contrary was by the state Supreme Court and the most that can be said of that decision is that the defendant prevailed in a matter of defense which it had pleaded, but, as we have seen, this does not convert a non-removable case into a removable one, in the absence of voluntary action on the part of the plaintiff, and it therefore results that the defendant did not at any time have the right to remove the case to the federal court, which it claims was denied to it, and that therefore, there being no substance in the claim of denial of federal right, this court is without jurisdiction to review the decision of the Supreme Court of Montana and the writ of error must be

Dismissed.